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008
No 2758

United States
Circuit Court of Appeals
For the Ninth Circuit.

H. E. ELLIS,

Appellant,

vs.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Appellees.


Transcript of Record.

Upon Appeal from the United States District Court for
the Territory of Alaska, Third Division.

Filed

APR 28 1916

F. D. Monckton,
Clerk.



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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Third Division.*

Names and Addresses of Attorneys of Record.

CHAS. G. GANTY, Valdez, Alaska,

Defendant and Plaintiff in Error.

DONOHOE & DIMOND, Valdez, Alaska,

LYONS & RITCHIE, Valdez, Alaska,

Plaintiffs and Defendants in Error. [1*]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 4, 1915. Arthur Lang, Clerk. By Chas. A. Hand, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Complaint.

Come now the above-named plaintiffs, and for cause of suit against the above-named defendant, allege as follows, to wit:

I.

That on the 15th day of May, 1907, the defendant was the sole and legal owner of those certain eight (8) lode mining claims, situate on the northerly

*Page-number appearing at foot of page of original certified Record.

side of Valdez Bay, between Gold Creek and Shoups Bay, in the Valdez recording precinct, Territory of Alaska, named and described as follows:

The Mystic No. 1 lode claim, notice of location of which is of record in Book K of Mining Locations, at page 506, of the records of said Valdez recording precinct, at Valdez, Alaska.

The Mystic No. 2 lode claim, notice of location thereof being of record in said Book K, at page 505, of said records.

The Mystery No. 1 lode claim, notice of location thereof being of record in Book O of Mining Locations, at page 452, of said records.

The Mystery No. 2 lode claim, notice of location thereof being recorded in said Book O, at page 453, of said records.

The Mystery No. 3 lode claim, notice of location thereof being recorded in said Book O, at page 605, of said records.

The Parallel No. 1 lode claim, notice of location thereof being of record in said Book O, at page 607, of said records.

The Parallel No. 2 lode claim, notice of location thereof being of record in said Book O, at page 606, of said records. [4]

The High Bar lode claim, notice of location of which is of record in said Book O, at page 451, of said records.

That the legal title to each and all of said mining claims ever since the said 15th day of May, 1907, has been and now is in the name of said defendant.

II.

That on the said 15th day of May, 1907, said defendant and plaintiffs Treat and Smith entered into a contract in writing concerning "Mystic No. 1" lode claim above described, this being the most valuable of said mining claims; said "Mystic No. 1" lode claim is described in said contract as "Mystic Lode Mining Claim." That under the terms of said written contract plaintiffs Treat and Smith advanced to defendant the sum of Five Hundred Dollars (\$500) for the purpose of enabling defendant to mine and ship to the Tacoma smelter, at Tacoma, Washington, five tons of ore from said mining claim, for the purpose of a test of said ore, and said plaintiffs were to receive twenty-five per cent of the net returns of said shipment, together with repayment to them of the said sum of Five Hundred Dollars so advanced, and, in case seventy-five per cent of the net returns of said shipment was not sufficient to repay said sum of Five Hundred Dollars to plaintiffs, then plaintiffs, under the terms of said contract, were to have, and said contract was to be construed as, a mortgage on said mining claim until they were fully repaid the said sum of Five Hundred Dollars.

A copy of said contract is hereto attached, marked Plaintiff's Exhibit "A," and made a part of this complaint.

III.

That, pursuant to the terms of said contract, plaintiffs Treat and Smith, on or about the 15th day

of May, 1907, did advance to defendant the sum of Five Hundred Dollars, and thereafter [5] and during the year 1907, defendant did mine from said mining claim five tons or ore, more or less, and ship the same to the Tacoma smelter. That the returns from said shipment of ore did not pay transportation and smelter charges, and plaintiffs Treat and Smith did not receive any profit from said shipment, nor did they receive any part of the said sum of Five Hundred Dollars advanced to defendant as aforesaid. That defendant was without money or means to continue mining and shipping ore from said claim, and the full sum of Five Hundred Dollars remained due and owing from defendant to plaintiffs Treat and Smith at the date of the next contract between defendant and plaintiffs Treat and Smith, which contract is hereinafter set out.

IV.

That at the date of the next contract between defendant and plaintiffs Treat and Smith and which is hereinafter set out, the defendant was indebted to plaintiff Treat on a certain promissory note, dated December 15, 1905, for the sum of Two Hundred Dollars, bearing interest from date at the rate of twelve per cent per annum, which said note was secured by a mortgage, executed by defendant to said Treat, on certain real property in the Town of Valdez, Alaska, which said note was long past due and the amount of said note and interest thereon on the 9th day of July, 1908, the date of the next contract hereinafter set out, was Two Hundred Sixty-one

Dollars, which said sum was then due and owing from defendant to plaintiff Treat.

V.

That on the 9th day of July, 1908, defendant entered into a contract in writing with plaintiffs Treat and Smith in words and figures as follows, to wit:

“CONTRACT.

THIS CONTRACT AND AGREEMENT, made and entered into this 9th day of July, 1908, by and between H. E. Ellis, party of the first part, and George C. Treat and Edmund Smith, parties [6] of the second part, all of Valdez, Alaska, WITNESSETH:

That the said party of the first part is the owner of eight (8) gold mining claims, situated on the North side of Valdez Bay and about ten (10) miles from Valdez, Alaska, the location certificates of which are of record in the office of the United States Commissioner at said Valdez, Alaska.

In consideration of the covenants hereinafter mentioned, and to be fully kept and performed by the parties of the second part, the said party of the first part agrees to deed to the Mystic Gold Mining Company, a corporation hereinafter to be formed, the said eight gold mining claims, in consideration of the issuance to him of all of the capital stock of said corporation.

That said first party will then transfer to the parties of the second part twenty (20) per cent of said capital stock, and will turn over to the treasury of the said corporation twenty (20) per cent of said stock

to be sold by said treasury as may be directed by the board of directors of said corporation, the money received from the sale of said twenty (20) per cent of said stock being the treasury stock as aforesaid or so much thereof as may be sold to be used in establishing a reduction plant upon said mining claims and the development of said claims.

That in consideration of the twenty (20) per cent issued to the parties of the second part, the said parties of the second part are to pay all expenses of incorporating said company, recording and filing all necessary papers thereon, and receipt in full all claims that said parties of the second part, or either of them, have against the said party of the first part; also to give their time and attention in selling the amount of treasury stock necessary to be sold, and give whatever time and attention that may be necessary to the proper organization of said corporation and the sale of said stock.

IN WITNESS WHEREOF, the parties have hereunto set their hands this 9th day of July, 1908.

H. E. ELLIS.

GEO. C. TREAT.

EDMUND SMITH.

In presence of:

B. B. LOCKHART.

United States of America,
Territory of Alaska,—ss.

BE IT REMEMBERED, that on this 9th day of July, 1908, before me, a notary public in and for the Territory of Alaska, personally appeared H. E. Ellis,

George C. Treat and Edmund Smith, known to me to be the persons described in and who executed the foregoing Contract, and each duly acknowledged to me that he signed the same for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal]

B. B. LOCKHART,
Notary Public." [7]

That the mining claims referred to in the foregoing contract as "(8) gold mining claims, situate on the North side of Valdez Bay and about ten (10) miles from Valdez, Alaska, the location certificates of which are recorded in the office of the United States Commissioner at Valdez, Alaska," are the eight mining claims described in the first paragraph of this complaint, that the consideration of said contract heretofore in this paragraph set out, and described therein as "claims that said parties of the second part, or either of them, have against the said party of the first part," to said contract, were the sums of Five Hundred Dollars theretofore advanced by plaintiffs Treat and Smith to defendant, as aforesaid, and the promissory note heretofore described held by plaintiff Treat against defendant, the total amount of said claims being Seven Hundred Sixty-one Dollars (\$761).

VI.

That on the execution of the contract last set out, plaintiffs Treat and Smith did release defendant from and receipt to him in full for said sum of Five

Hundred Dollars, and plaintiff Treat surrendered and delivered said promissory note to defendant and released him from all obligation thereon. That shortly thereafter plaintiffs Treat and Smith caused to be prepared the necessary papers for the formation of the corporation provided for in said contract, and were ready, able and willing at all times to proceed to the complete formation of said corporation, and to pay all expenses of incorporating said company and recording and filing of all necessary papers in any manner connected therewith, and to perform each and all of the other things to be done and performed by them under the terms of said contract. That it was understood and agreed at the time of the execution of said contract that each of the parties thereto [8] was to be one of the incorporators and would sign and execute the articles of incorporation when it was decided to form said corporation.

That after the execution of the contract of July 9, 1908, set out in the fifth paragraph of this complaint, owing to the stringency of the money market and the probable difficulty that would be experienced in selling the treasury stock of said corporation to an advantage, it was decided by all of the parties to said contract to await a more opportune time to form said corporation, and while so waiting, during which time plaintiffs Treat and Smith were endeavoring to procure a purchaser for the treasury stock of said corporation when the same should be organized, said Treat and Smith procured from one A. J. Crane an offer to lease said mining claims.

That thereupon defendant Ellis and plaintiffs Treat and Smith agreed mutually to hold said contract of July 9, 1908, in abeyance and enter into a contract with the said A. J. Crane to lease all of said mining claims to said Crane, at which time defendant specifically agreed verbally to and with plaintiffs Treat and Smith that at the termination of said lease he would join Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and would carry out all of the terms of said contract to be performed by him thereunder, or, that he, defendant, would deed to each of plaintiffs Treat and Smith an undivided one-tenth interest in and to each and all of said mining claims.

VII.

That, pursuant to said agreement, on the 5th day of June, 1909, defendant and plaintiffs Treat and Smith, as parties of the first part, entered into a contract with said Crane, as party of the second part, giving and granting to the said Crane an option to lease each and all of said mining claims for a period of six [9] years, at a rent or royalty of twenty per cent of the net product or proceeds for the first year and twenty-five per cent of said net proceeds for the remaining term of said lease, and providing that eighty-five per cent of said rent or royalty should be paid to defendant Ellis, and the remaining fifteen per cent of said royalty should be paid to plaintiffs Treat and Smith. That a copy of said contract with Crane is hereto attached, marked Plaintiff's Exhibit "B," and made a part of this complaint.

That at the time of the negotiations which resulted in the contract described as Plaintiff's Exhibit "B," the said defendant Ellis insisted on a higher rent or royalty than that named in the contract, and the said Crane refused to agree on a higher royalty, and thereupon plaintiffs Treat and Smith, believing the lease to be advantageous, agreed that defendant should have eighty-five per cent of said royalty instead of eighty per cent thereof to which percentage he was entitled at that time as the owner of eighty per cent of said mining claims, in order to induce defendant to enter into said lease.

VIII.

That thereafter by mesne conveyances B. F. Millard became assignee of the contract between plaintiffs Treat and Smith and defendant Ellis with said Crane, a copy of which contract is attached hereto and marked Plaintiff's Exhibit "B," and thereafter on the 23d day of July, 1909, defendant and plaintiffs Treat and Smith, as owners of each and all of said mining claims, entered into a lease of each and all of said mining claims with B. F. Millard, pursuant to the terms of the contract marked Plaintiff's Exhibit "B," heretofore referred to. That said lease to said B. F. Millard provided, among other things, that at the termination of said lease all machinery, [10] tools, equipment and improvements placed upon said mining claims by said lessee, his successors or assigns, should, at the termination of said lease, be left upon the property and become the property of the lessors. That copy of said lease

with B. F. Millard is hereto attached, marked Plaintiff's Exhibit "C," and made a part of this complaint.

IX.

That thereafter on the 4th day of August, 1909, the said B. F. Millard assigned and transferred said lease to the Cliff Mining Company, a corporation, and thereupon said Cliff Mining Company entered into the possession of said mining claims and operated them under said lease until on or about the 15th day of August, 1914, at which time the said Cliff Mining Company surrendered the possession of said claims and the machinery, tools, equipment and improvements placed thereon to the lessors in said lease, to wit, defendant Ellis and plaintiffs Treat and Smith.

X.

That during the time the said Cliff Mining Company was operating said mining claims it placed thereon a large amount of valuable mining machinery, tools, buildings and equipment, of the value of more than Thirty Thousand Dollars, which said machinery, tools, buildings and equipment are now upon said mining claims. That the plaintiffs herein, as the owners of twenty per cent interest in said mining claims, and under the terms of said lease, are now the owners of twenty per cent interest in and to said tools, machinery, buildings and equipment.

XI.

That on or about the 3d day of January, 1913, plaintiff Logan Archibald purchased from plaintiff Edmund Smith an undivided one-half of said

Smith's interest in and to each and [11] all of said mining claims, and in and to all of the rights and privileges accruing to the said Smith by reason of the contracts hereinbefore mentioned and set out, and said plaintiff Archibald is now and ever since on or about the said 3d day of January, 1913, has been the owner of one-half of the interest formerly belonging to said Plaintiff Smith.

XII.

That plaintiff Treat is now the owner of an undivided one-tenth interest, plaintiff Smith is the owner of an undivided one-twentieth interest, and plaintiff Archibald is the owner of an undivided one-twentieth interest in and to each and all of said mining claims and in and to all of the machinery, tools, equipment and buildings and improvements thereon. That defendant Ellis, during all of the time hereinbefore mentioned since the execution of the contract of the 9th day of July, 1908, heretofore in the fifth paragraph of this complaint set out, until about the month of February, 1915, never questioned or disputed the right and title of plaintiff to said premises and property as herein stated, but during all of said time recognized and approved said claim of title by plaintiffs as herein stated.

XIII.

That ever since the surrender of said property by said Cliff Mining Company to the lessors named in Plaintiffs' Exhibit "C," the plaintiffs herein have been ready, able and willing to perform all of the matters and things to be performed by them, pursuant to the contract of July 9, 1908, heretofore set

out, but defendant Ellis has remained without the Territory of Alaska, residing in the States of Colorado and Montana, and has refused to join plaintiffs in the organization of said corporation, or to deed to plaintiffs an undivided twenty per cent interest in and to each and all of said mining claims, and during or about the month of February, 1915, said defendant Ellis disputed the claim of title of plaintiffs and denied that [12] plaintiffs herein have any right, title or interest whatever in or to said mining claims, or in or to said machinery, tools, equipment, buildings and improvements. And said defendant is now threatening and attempting to transfer the title to each and all of said mining claims to parties other than the plaintiffs herein in violation of the contracts and agreements aforesaid, and is threatening to sell and remove the machinery, tools, equipment and buildings now upon said property as aforesaid, without recognizing plaintiffs' right, title or interest in and to said property, or any part thereof, and unless enjoined by order of this Court defendant will make said transfer.

WHEREFORE, plaintiffs pray a decree of this court as follows:

First. That defendant specifically perform the contract of July 9, 1908, set out in the fifth paragraph of this complainant, or that he deed to plaintiffs Treat and Smith each an undivided one-tenth interest in and to each and all of said eight mining claims.

Second. That plaintiffs herein be adjudged and decreed to be the owners of an undivided one-fifth interest in and to all machinery, tools, equipment,

buildings and improvements placed upon said mining claims by the Cliff Mining Company, in the following proportions: Geo. C. Treat, an undivided one-tenth interest; Edmund Smith, an undivided one-twentieth interest; Logan Archibald, an undivided one-twentieth interest.

Third. That defendant, his agents, attorneys and employees, be enjoined and restrained from selling or removing any of said machinery, tools, equipment or buildings pending this suit. [13]

Fourth. That defendant be enjoined from transferring the title of each and all of said mining claims, and from leasing or encumbering said mining claims pending the final determination of this suit.

Fifth. For such other and further relief as to the court may seem just and equitable.

Sixth. That plaintiffs have judgment against the defendant for their costs and disbursements in this action.

DONOHUE & DIMOND and
LYONS & RITCHIE,

Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

Geo. C. Treat, being first duly sworn, deposes and says that he is one of the plaintiffs named in the foregoing complaint; that I have read said complaint, know the contents thereof and that the same is true I verily believe.

GEO. C. TREAT,

Subscribed and sworn to before me this 4th day of May, 1915.

[Official Seal]

ANTHONY J. DIMOND,

Notary Public for Alaska.

My commission expires Mar. 13, 1917. [14]

Plaintiff's Exhibit "A" [to Complaint].

This contract made this 15th day of May, 1907, by and between H. E. Ellis of Valdez, Alaska the party of the first part and Geo. C. Treat and Edmund Smith of the same place parties of the second part, witnesseth: That the said party of the first part is the owner of the "Mystic lode mining claim, situated on the north side of Valdez Bay, Territory of Alaska, the location certificate of which is recorded in the office of the United States Commissioner at Valdez, Alaska. That said party of the first part is desirous of getting out ore and shipping about five tons to the smelter for a test run and has not the money for said purpose. The parties of the second part agree to and hereby do put up the sum of \$500 for carrying out said joint venture. That out of the proceeds of said five tons more or less said parties of the second part are to receive ($\frac{1}{4}$) one-fourth of net smelter returns, also the said sum of Five Hundred (\$500) Dollars. That if three-quarters ($\frac{3}{4}$) of the returns of said five tons is insufficient to pay said sum of Five Hundred (\$500) Dollars, then in that case said parties of the second part are to have a lien on said mining claim and all ore therein contained to secure them to the said Five Hundred (\$500) Dollars or so much thereof as remains unpaid after said shipment and said party of the first

part is to continue the shipment of ore until said sum of Five Hundred (\$500) Dollars is fully paid and for the purpose of securing same this contract is deemed and considered by the parties hereto as a mortgage on said mining claim with full power of sale in the manner provided by law for the sale of real estate under real mortgage and for that purpose said party of the first part gives, grants, sells and assigns to the parties of the second part said mining claim, but as security only for said Five Hundred (\$500) Dollars and upon payment of said sum of Five Hundred (\$500) by the party of the first [15] part at any time within six (6) months from date hereof and the delivery to the parties of the second part of one-quarter ($\frac{1}{4}$) of smelter returns from said shipment, less freight and smelter charges, this agreement to be null and void otherwise to remain in full force and effect.

In witness whereof we have hereunto set out hands and seals the day above written.

H. E. ELLIS,
GEO. C. TREAT,
EDMUND SMITH,

(In presence of)

B. B. LOCKHART.

United States of America,
Territory of Alaska.

Be it remembered that on this 15th day of May, 1907, before B. B. Lockhart, notary public for the Territory of Alaska, personally appeared H. E. Ellis, known to me to be the person described in and who

executed the foregoing instrument and acknowledged to me that he executed the same freely.

Witness my hand and seal the day and year above written.

[Seal]

B. B. LOCKHART,
Notary Public. [16]

Plaintiff's Exhibit "B" [to Complaint].

MEMORANDUM OF OPTION AGREEMENT.

This option agreement made and entered into this 5th day of June, 1909, by and between H. E. Ellis, Geo. C. Treat, and Edmund Smith, parties of the first part, all of Valdez, Alaska, and A. J. Crane of Seattle, Washington, party of the second part, WITNESSETH:

That for and in consideration of the sum of One Dollar in hand paid by the party of the second part to the parties of the first part and the carrying out of the further covenants herein mentioned the parties of the first part hereby give and grant unto the party of the second part the exclusive right, privilege, and option to lease, certain eight lode mining claims situated on the north side of Valdez Bay, known as the Mystic Group, Territory of Alaska, located by H. E. Ellis, one of the parties of the first part. That said lease to be upon the following terms and conditions, to wit:

For a period of six (6) years. For the first year, twenty per cent of the net product of proceeds of said claims and for the remaining five years, twenty-five per cent of said net proceeds from said mining claims; eighty-five per cent of said net proceeds to be paid to H. E. Ellis, one of the parties of the first part,

and fifteen per cent to be paid to Geo. C. Treat and Edmund Smith, settlement to be made each month. That in consideration of the acceptance of this option or entering into said lease the party of the second part is to, as soon as practicable, install reduction works suitable for reducing the ores from said mining claims in the most economical and practicable manner, said machinery or reduction plant to be of at least twenty ton daily capacity, and to employ a sufficient force only to work said *or* mining claims and operate said machinery in a practicable and economical manner. That the expense of operating said mines, mining claims, and reduction plant shall be [17] limited to the actual expense and cost to operate the same in an economical and practicable manner and shall not include salaries of officers of any corporation organized by the party of the second part or his assigns as such, but shall be limited to the actual expense of mining said ore and reducing the same including only the superintendent, miners, mill man, and other labors, explosives, repairs, but not to include the original cost of reduction plant. That in the operation of said mine the exploration and working the same shall be done in a good minerlike manner and with due degard for future working of the same and where necessary, properly timbered. It being the intention of the parties hereto that said party of the second part, his assigns or sucessors, shall not strip the said mine of its valuable ores except as the same are encountered in the natural mining and operation of the same with due regard to the permanency of the same and its future operation.

after the expiration of this lease. That the parties of the first part, their assigns or agent, shall at all times during business hours be permitted to examine the accounts of receipts and disbursements and examine the workings of the mine at any and all times during the continuance of this lease and in case of any dispute or disagreement should arise as to the proper working of the same or any of the matters herein set forth, the same shall be left to arbitration, either to one party mutually agreed upon by the parties hereto, but should they fail to agree upon one party then each party may select a representative or arbitrator and the two so selected in case they fail to agree may select a third and the decision of said sole arbitrator or the majority of the three as above provided shall be binding, final, and conclusive to the parties hereto. That a failure to work said [18] mine in an economical manner or the violation of any of the provisions, covenants, or agreements herein contained, by the party of the second part, his successors or assigns, shall at the option of the parties of the first part work a forfeiture of this lease. That at the expiration of the time herein set forth, to wit, six years, if the working and operation of said mine shall in the opinion of the parties of the first part have been economically and satisfactory, the party of the second part, his successors, heirs or assigns, shall have the right to an extension or renewal of this lease upon such terms and for such royalty or part of the proceeds as may be agreed to by the parties hereto depending upon the condition of the mine at said time. It is further understood

that all machinery, tools, equipment, and improvements placed upon said mining claims by the party of the second part, his successors, heirs or assigns, shall at the termination of this lease be left upon the property and become the property of the parties of the first part as a part of the consideration hereof and of said lease. That this contract, option, and agreement and the lease herein provided for shall descend to and be binding upon the heirs, executors, administrators, successors or assigns of the parties hereto.

IN WITNESS WHEREOF we have hereunto set our hands this 5th day of June, A. D. 1909.

H. E. ELLIS,
GEO. C. TREAT,
EDMUND SMITH,
A. J. CRANE.

In the presence of:

[19]

Plaintiff's Exhibit "C" [to Complaint].

LEASE OF MINING GROUND.

THIS INDENTURE, made this 23d day of July, A. D. 1909, between H. E. Ellis, four-fifths owner, George C. Treat and Edmund Smith, each owning ten (10) per cent, all of Valdez, Alaska, parties of the first part and lessors, and B. F. Millard, Trustee, of Valdez, Alaska, party of the second part and lessee, WITNESSETH:

That the said lessors, for and in consideration of the rents, royalties, covenants and agreements here-

inafter reserved, and by the said lessee, his successors and assigns to be paid, kept and performed, have let, and by these presents do let unto the said lessee, his successors or assigns, all the following described mines, mining claims and mining property situated on the northerly side of Valdez Bay between Gold Creek and Glacier Bay, to wit:

The Mystic No. 1 lode claim, recorded in Book K of Mining Locations, on page 506;

The Mystic No. 2 lode mining claim recorded in Book K of Mining Locations, page 505;

The Mystery No. 1 lode claim, recorded in Book O of Mining Locations, page 452;

The Mystery No. 2 lode claim, recorded in Book O of Mining Locations, page 453;

The Mystery No. 3 lode claim, recorded in Book O of Mining Locations, page 605;

The parallel No. 1 lode claim, recorded in Book O of Mining Locations, page 607;

The Parallel No. 2 lode claim, recorded in Book O of Mining Locations, page 606;

The High Bar lode claim recorded in Book O of Mining Locations, page 451, together with the appurtenances.

TO HAVE AND TO HOLD unto the said lessees, his successors or assigns, for the term of six (6) years from the date hereof, expiring on the 23d day of July, 1915, unless sooner forfeited as determined herein.
[20]

In consideration of said lease, the said lessee, his successors or assigns, covenant and agree with the said lessors, as follows, to wit: To enter upon

said premises and mines and work the same in good minerlike manner, and in manner necessary to good and economical mining so as to take out the greatest amount of ore possible in due regard to the safety, development and preservation of the said premises as a workable mine; to work and mine said premises as aforesaid steadily and continuously from the date of this lease; to well and sufficiently timber said mine at all points and places where proper and necessary, and to repair all old timbering whenever necessary or whenever the same may become decayed and unsafe; to allow said lessors, their heirs or assigns, to enter upon and into all parts of said mine for the purpose of inspection; that during the life of this lease to perform the annual assessment work on said mining claims, and to annually furnish to the lessors affidavits and proofs of the performance of such assessment or representation work, and to hold and preserve the said possession to said premises during the life of this lease, and not allow any person under any pretense to gain or hold possession of the same or any part thereof adverse to the lessors; to occupy and hold all cross or parallel lodes, dips, spurs, feeders and crevices or the mineral deposits of any kind upon said premises which may be discovered under this lease, and which may be discovered by said lessee, his successors or assigns, or any person or persons under him or them, in any manner at any point within the boundary lines of said lode claims, the same to be the property of said lessors with privileges, however, that the said lessee, his

successors, or assigns, of working the same under this lease, and the said lessee, his successors or assigns, further agree not to locate or record any mining ground or claims that will conflict with any of the lode [21] claims described herein except in the name of said lessors.

Said lessee, his successors or assigns, as soon as practicable, are to install reduction works suitable for reducing said ores from said mining claims in an economical and practicable manner, said machinery or reduction plant to be at least of twenty (20) tons daily capacity.

That said lessee, his successors or assigns, shall not strip or gouge the said mine or mining claims of its valuable ores except as the same are encountered in working the same in a minerlike manner, and in the operation of the said mines and mining claims, and the same shall be worked and operated with due regard to the permanency of the same and its future operation after the expiration of this lease.

That as rents and royalties, the said lessee shall pay to the said lessors for the first year twenty (20) per cent of the net profit or proceeds of said mining claims, and of the remaining five (5) years twenty-five (25) per cent of said net proceeds from said mining claims. Eighty-five (85) per cent of said royalties shall be paid to H. E. Ellis, one of the lessors, and fifteen (15) per cent thereof to be paid to George C. Treat and Edmund Smith, share and share alike. Settlement shall be made on the 20th day of each and every month for the proceeds of the preceding month.

That the expense of operating said mines and mining claims and reduction plant or plants shall be limited to the actual expense and cost of operating the same in an economical and practicable manner, and shall not include salaries of any person except those actually employed in working the said mines and operating the said reduction plant, and limited to the actual expense for mining said ore and reducing the same and including only the actual expense of superintendent, miners, mill men and other labor necessarily and economically employed, explosives and repairing, but not to include the [22] cost of the reduction plant or plants or the installation of the same.

That the lessors, their assigns or agents, shall at all times during business hours, be permitted to examine the accounts, receipts and disbursements, and to examine the workings of the mines at any and all times during the continuance of this lease, and in case of any dispute or disagreement arising as to the proper working of the same, or any of the matters herein set forth, such difference shall be left to arbitration either to one party mutually agreed upon by the parties hereto, but should they fail to agree upon one party, then each party may select a representative or arbitrator, and the two so selected, in case they fail to agree, may select a third, and the decision of the said sole arbitration, or the majority of the three as above provided, shall be binding, final and conclusive upon the parties hereto, their heirs, successors or assigns.

That a failure to work said mines and mining

claims in an economical and practical manner, or the violation of any of the provisions, covenants or agreements herein contained by the lessee, his successors or assigns, shall, at the option of the parties of the first part, work a forfeiture of this lease.

That at the expiration of the time set forth herein, to wit, six (6) years, if the working and operation of said mines shall in the opinion of the parties of the first part, have been economically and satisfactorily performed, the lessee, his successors or assigns, shall have the right to an extension or renewal of this lease upon such terms and such royalty or a part of the proceeds as may be agreed upon by the parties hereto, their heirs, successors, or assigns, depending upon the condition of the said mines at said time.

It is further understood and agreed that all machinery, [23] tools, equipment and improvements placed upon said mining claims by the lessee, his successors or assigns, shall at the termination of this lease, be left upon the property and become the sole property of the lessors, as a part of the consideration hereof and of said lease; provided, however, that if the profits made by the lessee during the life of this lease shall not equal the cost of said reduction plant or plants and the installation thereof, the lessors, their heirs, successors or assigns, can elect to pay the difference to said lessee, his successors or assigns, less the natural depreciation of the use, wear and tear and retain the said machinery, or if said lessors their heirs, successors

or assigns, refuse to pay such difference, less the depreciation thereof, then and in that case the said lessee, his successors or assigns, shall have the right to remove the said reduction plant. That the amount to be allowed in said depreciation, wear and use, shall be ascertained by arbitration. If said parties fail to agree in considering such depreciation, the value of more modern machinery shall be taken *in the* consideration.

That said lessee, his successors or assigns, are to keep at all times the drifts, tunnels and other passages and workings of said demised premises thoroughly drained and cleared of loose rock and rubbish of all kinds.

That at the expiration of time mentioned herein as the termination of this lease, unless said lessors elect to renew the same, or of any termination thereof for any of the reasons herein set forth, said lessee, his successors or assigns, to deliver up the said premises with the appurtenances and all improvements subject to the foregoing provisions in good order and condition with all tunnels and other passages thoroughly clear of rubbish and drain, and the said mining property at all points ready for [24] immediate and continued workings of the same.

And finally upon the violation by the said lessee, his successors or assigns, or any persons under him or them of any covenants hereinbefore reserved, the term of this lease shall at the option of the said lessors, expire, and the same and other premises with the appurtenances shall become forfeited to

the said lessors, and the said lessors or their agent may thereupon, after demand of possession enter upon said premises and dispossess all persons occupying the same.

That each and every clause and covenant of this indenture shall extend to and bind the heirs, executors, administrators, successors or assigns of all the parties hereto.

WITNESS our hands and seals the day and year first above written.

H. E. ELLIS. (Seal)

GEO C. TREAT. (Seal)

EDMUND SMITH. (Seal)

B. F. MILLARD. (Seal)

In the presence of:

B. B. LOCKHART.

CHAS. E. BUNNELL.

United States of America,
Territory of Alaska,—ss.

BE IT REMEMBERED that on this 23d day of July, A. D. 1909, before me, a notary public in and for the Territory of Alaska, personally appeared H. E. Ellis, George C. Treat, Edmund Smith and B. F. Millard, known to me to be the persons described in and who executed the foregoing lease and they each duly acknowledged to me that they signed and sealed the same as their free act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year first above written.

[Seal] B. B. LOCKHART,
Notary Public. [25]

Motion to Strike [Portions of Complaint].

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721,

GEORGE C. TREAT, EDMUND SMITH and
LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Comes now the defendant in the above-entitled action and moves the Court for an order striking from the complaint of the plaintiffs herein the following:

I.

All of paragraph II of said complaint, for the reason that the same is immaterial, irrelevant, redundant and surplusage.

II.

All of paragraph III of said complaint, for the reason that the same is immaterial, irrelevant, redundant and surplusage.

III.

All of paragraph IV of said complaint, for the reason that the same is immaterial, irrelevant, redundant and surplusage.

IV.

All of paragraph V of said complaint, from the beginning of the first line on page 5 to the end of said paragraph, for the reason that the same is imma-

terial, irrelevant and redundant.

V.

All of the first lines of paragraph VI of [26] said complaint, to the period in the fifth line of said paragraph; and all of said paragraph VI on page 6 from the beginning of the fourth line of said page 6 to the period on the fourteenth line thereof; for the reason that the same is immaterial, irrelevant, redundant and surplusage.

VI.

All of paragraph VII of said complaint, from the beginning of the ninth line on page 7 down to the close of said paragraph, for the reason that the same is immaterial, irrelevant, redundant and surplusage.

VII.

All of paragraph X of said complaint, from the period on the sixth line to the close of said paragraph, for the reason that the same is immaterial, redundant and surplusage.

VIII.

All of paragraph XII of said complaint, for the reason that the same is immaterial, irrelevant and redundant.

IX.

All of plaintiff's exhibit marked Exhibit "A" for the reason that the same is immaterial and irrelevant.

CHAS. G. GANTY,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Terri-

tory of Alaska, Third Division, June 2, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [27]

United States of America,
Territory of Alaska,—ss.

DUE AND LEGAL SERVICE IS HEREBY ACCEPTED, this 8th day of June, A. D. 1915, by receiving a copy thereof, duly certified to by Chas. G. Ganty, one of the attorneys for the defendant.

ANTHONY J. DIMOND,
One of *Attorney* for Plaintiffs. [28]

**[Order Denying Motion to Strike Portions of
Complaint.]**

*In the District Court for the Territory of Alaska,
Third Division.*

Special February, 1915, Term—June 21—65th Court
Day. Monday.

No. 721,

GEORGE C. TREAT, EDMUND SMITH and
LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

MINUTE ORDER ON MOTION TO STRIKE.

Now, on this day, the motion of the defendant to strike came on for hearing, Donohoe & Dimond appearing as attorneys for the plaintiffs and C. G. Ganty representing the defendant, and after argu-

ments had on the same and the Court being fully advised in the premises,

IT IS ORDERED that said motion be and the same is hereby denied to which order and ruling of the Court defendant excepts and exception is duly allowed.

Entered Court Journal No. 9, page No. 166. [29]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721,

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Demurrer.

Comes now the defendant, and by his attorney, Chas. G. Ganty, and demurs to the complaint of the plaintiffs on file in the above-entitled court and cause, for the following reasons, to wit:

I.

That several causes of action have been improperly united.

II.

That the complaint does not state facts sufficient to constitute a cause of action against defendant and in favor of plaintiffs.

CHAS. G. GANTY,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

Legal service is hereby admitted by receipt of a duly certified copy of the above demurrer.

Dated this 22d day of June, 1915.

ANTHONY J. DIMOND,
One of the Attorneys for Plaintiffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, June 22, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[30]

*In the District Court for the Territory of Alaska,
Third Division.*

Entered Court Journal No. 9, page No. 173.

February, 1915, Term—June 23d—Wednesday.

No. 721,

GEORGE C. TREAT, EDMUND SMITH and
LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Minute Order Overruling Demurrer.

The demurrer in the above-entitled action coming on to be heard, Donohoe & Dimond and Lyons & Ritchie appearing as attorneys for the plaintiffs and C. G. Ganty appearing as attorney for the defendant,

and after arguments had and the demurrer being fully considered by the Court,

IT IS ORDERED that said demurrer be and the same is hereby overruled, and the defendant is given until Monday, June 28th, 1915, in which to further plead in this action, to which order and ruling of the Court defendant excepts and exception is allowed.

[31]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Answer.

Comes now this defendant, H. E. Ellis, and answering to the several paragraphs of plaintiffs' complaint, paragraph by paragraph, in the order of said complaint, alleges and denies as follows, to wit:

I.

This defendant admits that on the 15th day of May, 1907, defendant was the sole and legal owner of those certain eight lode mining claims described in paragraph I of said complaint; and that the legal title to each and all of said mining claims ever since the said 15th day of May, 1907, has been and now is in the name of said defendant.

II.

This defendant denies that the "Mystic No. 1" lode claim named in paragraph II of said complaint is the most valuable of said mining claims; but admits the other allegations in said paragraph contained.

III.

This defendant admits that pursuant to the terms of the contract described in paragraph II of said complaint, plaintiffs Treat and Smith did advance to defendant the sum of Five Hundred Dollars and that defendant did mine from said mining claims five tons of ore, more or less; but defendant specifically [32] denies each and every of the other allegations of said complaint in paragraph III contained.

IV.

This defendant admits that at the date of the contract between defendant and plaintiffs Treat and Smith, in paragraph V of said complaint set out, defendant was indebted to said Treat in the sum of Two Hundred Dollars with interest thereon from December 15th, 1905, and that said sum and interest was due and owing to said Treat from defendant on the 9th day of July, 1908, but defendant denies that defendant was indebted to said Treat on a certain promissory note dated December 15th, 1905, or on any promissory note whatsoever. And defendant denies each and every allegation and averment in paragraph IV of said complaint except as hereinabove admitted; and further answering said paragraph IV defendant says that on December 15th,

1905, he executed a mortgage on certain real property of defendant, situated in the town of Valdez, in what was then known as the Reservation Addition to said town of Valdez with intent to secure said Treat in the payment of the aforesaid sum of Two Hundred Dollars and interest, which said mortgage defendant delivered to said Treat on or about the 15th day of December, 1905; but that defendant did not at any time execute or deliver to said Treat, or to any person on behalf of said Treat, any note or other acknowledgment of said debt, excepting only the said mortgage, which said mortgage is of record in Book A of Mortgages on page 475 of the records of the Valdez Recording Precinct, in the office of the Recorder for said Precinct, at Valdez, Alaska.

V.

This defendant admits that on the 9th day of July, 1908, he entered into a contract in writing with plaintiffs Treat and Smith, as set forth in Paragraph V of said complaint; and defendant admits that the mining claims referred to in said contract are the eight mining claims described in the first paragraph of said complaint. Defendant denies that the consideration [33] of said contract, set out and described in said contract as "claims that the said parties of the second part, or either of them, have against the said party of the first part," to said contract, were the sums of Five Hundred Dollars theretofore advanced by plaintiffs Treat and Smith to defendant, as aforesaid, and the promissory note described in said complaint as held by plaintiff Treat against defendant, and defendant denies that

said Treat held any promissory note against defendant on the 9th day of July, 1908, or at any other time; and defendant denies that the total amount of said claims on said date was Seven Hundred Sixty-one Dollars, but states the fact to be that the said consideration was the amount of Five Hundred Dollars less three quarters ($\frac{3}{4}$) of the net returns of the ore mined by defendant from the said Mystic No. 1 lode claim, as set forth in paragraph III of this answer, and as more fully appears in the first paragraph of defendant's affirmative defense hereinafter set forth; and the sum of Two Hundred Dollars and interest owing by defendant to plaintiff Treat, as set forth in paragraph IV of this answer.

VI.

Defendant denies that on the execution of the aforesaid contract, set out in paragraph V of said complaint, plaintiffs Treat and Smith released defendant from and receipted to him in full for said sum of Five Hundred Dollars, or for any sum; and defendant denies that plaintiff Treat surrendered and delivered said promissory note to defendant and released him from all obligation thereon; and further answering this paragraph defendant says that at the time of the execution of the said contract the plaintiffs Treat and Smith did not release defendant from any sum whatsoever; and did not receipt to defendant for any sum whatsoever, nor did said Treat, at said time, or at any other time, surrender or deliver to defendant any promissory note, or execute any instrument purporting to release defendant from any obligation.

Further answering this paragraph, defendant admits that plaintiffs Treat and Smith, prepared or caused to be prepared [34] the necessary papers for the formation of the corporation provided for in said contract; but defendant denies that plaintiffs Treat and Smith were ready, able, and willing at all times to proceed to the complete formation of said corporation, and to pay all expenses of incorporating said corporation and recording and filing of all necessary papers in any manner connected therewith, and to perform each and all of the other things to be done and performed by them under the terms of said contract; and defendant denies that said Treat and Smith were at any time; after the preparation of the necessary papers for the formation of the said corporation either ready, able or willing to proceed to the complete formation of said corporation, or to pay all expenses of the incorporation of said company, and recording and filing of all necessary papers in any manner connected therewith, or to perform each and all of the other things to be done and performed by them under the terms of said contract, or to perform any of the said necessary things by said plaintiffs Treat and Smith to be done and performed under the terms of said contract.

And further answering said paragraph defendant denies that after the execution of said contract of July 9, 1908, or at any other time, or for any reason, it was ever decided by all of the parties to said contract to await a more opportune time to form said corporation, and defendant denies that whilst wait-

ing a more opportune time to form said corporation the plaintiffs Treat and Smith were endeavoring to procure a purchaser for the treasury stock of said corporation when the same should be organized; and defendant denies that said Treat and Smith procured from one A. J. Crane an offer to lease said mining claims of defendant. And further answering this paragraph, defendant denies that defendant and plaintiffs Treat and Smith agreed mutually to hold said contract of July 9, 1908, in abeyance, as stated therein, and defendant admits that on or about June 5th, 1909, he agreed to enter into a contract with one A. J. Crane to lease all of said mining claims to [35] said Crane, but defendant specifically denies that at that time, or at any other time, he ever specifically agreed, either verbally or in writing, or at all, to or with plaintiffs Treat and Smith, that at the termination of said lease he would join said Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and that he would carry out all the terms of said contract to be performed by him thereunder; and defendant denies that he at that time, or any other time, agreed with said Treat and Smith that he, the defendant, would deed to each of plaintiffs Treat and Smith an undivided one-tenth interest in and to each and all of said mining claims, or any interest in or to any of said mining claims.

VII.

Defendant admits that on the 5th day of June, 1909, defendant and plaintiffs Treat and Smith, as

parties of the first part, entered into a contract with said Crane, as party of the second part, and that a copy of said contract is attached to plaintiffs' complaint, marked Plaintiffs' Exhibit "B," but defendant denies each and every allegation and averment in said paragraph contained, except as hereinabove specially admitted.

VIII.

Defendant admits that B. F. Millard became assignee of the contract between plaintiffs Treat and Smith and defendant with said Crane, and that thereafter, on the 23d day of July, 1909, defendant and plaintiffs Treat and Smith, entered into a lease of each and all of said mining claims with B. F. Millard, pursuant to the terms of the contract marked Plaintiffs' Exhibit "B," heretofore referred to; but defendant denies that said Treat and Smith entered into said contract as owners or as part owners of each and all of said mining claims or of any of said claims.

IX.

Defendant admits that on the 4th day of August, 1909, said B. F. Millard assigned and transferred said lease to the Cliff [36] Mining Company, a corporation, and thereupon said Cliff Mining Company entered into possession of said mining claims and operated them under said lease; but defendant denies that said Cliff Mining Company operated said mining claims until August 15th, 1914, or at any time after the — day of July, 1914; and further answering said complaint and paragraph, defendant denies that said Cliff Mining Company surrendered

the possession of said claims and of said machinery, tools, equipment and improvements placed thereon, to the lessors in said lease, defendant Ellis and plaintiffs Smith and Treat, but defendant states the fact to be that defendant Ellis, on or about the —— day of July, 1914, took sole possession of said mining claims, and ever since so taking possession thereof has held said possession adversely to all other persons whomsoever, and still continues to hold such possession of said claims and of said machinery, tools, equipment and improvements placed thereon.

X.

Defendant admits that said Cliff Mining Company placed upon said claims some valuable mining machinery, tools, equipments and improvements, but defendant denies that the value of said mining machinery, tools, equipment and improvements is of the sum of Thirty Thousand Dollars, or that said value is any sum over the sum of Five Thousand Dollars; and defendant denies that the plaintiffs herein, or any of them, are the owners of twenty per cent interest in and to said tools, machinery, buildings and equipment, or of any interest therein whatsoever.

XI.

Defendant says that he has not sufficient knowledge of the allegations set forth in paragraph XI of said complaint, whereon to form a belief and for lack of sufficient information and knowledge whereon to form a belief denies the same.

XII.

Defendant denies that plaintiff Treat is the owner

of an undivided one-tenth interest, and denies that plaintiff Smith [37] is the owner of an undivided one-twentieth interest, and denies that the plaintiff Archibald is the owner of an undivided one-twentieth interest in and to each and all of said mining claims and in and to all of the machinery, tools, equipment, and buildings and improvements thereon; and defendant denies that said plaintiffs, or any of them, are the owners of any interest whatsoever in and to said mining claims or in and to any of said mining claims, or in and to said machinery, tools, equipment, buildings and improvements thereon; further answering said paragraph, defendant denies that during all the time mentioned since the execution of the contract of the 9th day of July, 1908, in the fifth paragraph of plaintiffs' complaint set out, until about the month of February, 1915, or at any other time, defendant ever recognized or approved any claim of right and title of plaintiffs, or any of them, in and to said mining claims, or in and to said property as in paragraph XII of said complaint set forth; but defendant states the fact to be that until shortly prior to the commencement of this action, neither the plaintiffs herein nor any of them have ever claimed, or set up, any right or title in or to said mining claims, or in and to said machinery, tools, equipment, buildings and improvements thereon, to the knowledge of defendant, until about the month of August, 1914, at which time plaintiff Treat went to said mining property and mining claims and asserted a right to enter thereon, but that

one John Hughes, who was then and there in charge of said mining claims and property as agent for said defendant Ellis, at that time informed said Treat of his said agency, and refused to allow said Treat to enter upon said premises or to take possession thereof or of any of said property;

XIII.

Defendant denies that ever since the surrender of said property by said Cliff Mining Company. or at any other time, the plaintiffs herein, or any of them, have been ready, able and willing to perform all the matters and things to be performed by them. [38] pursuant to said contract of July 9, 1908, in paragraph V of plaintiffs' complaint set out, and defendant denies that said Cliff Mining Company surrendered said property to any of the lessors named in the lease, a copy of which lease is attached to said complaint, marked Plaintiffs' Exhibit "C," but states the fact to be that defendant took possession of said property as in paragraph XII of this answer set forth, and that said Cliff Mining Company thereafter notified said lessors of its intention to abandon said lease and said property on or about August 15th, 1914; further answering said paragraph, defendant admits that he has been without the Territory of Alaska, and that he has resided in the State of Colorado, but defendant denies that he has refused to join plaintiffs in the organization of said corporation, or to deed to plaintiffs an undivided twenty per cent interest in and to each and all of said mining claims, and defendant further says that

plaintiffs have never, during all the time of his said residence out of the Territory of Alaska, or at any time since June 5, 1909, demanded of defendant to join them in the organization of said corporation, or to deed to plaintiffs an undivided twenty per cent interest in and to each and all of said mining claims, or any interest therein.

And further answering said paragraph, defendant denies that he is now threatening or attempting to transfer the title to each and all of said mining claims to any parties whatsoever, and denies that such transfer if attempted would be in violation of the agreements and contracts in plaintiff's complaint set forth, or of any agreement entered into or existing between plaintiffs and this defendant and defendant denies that he is threatening to remove and sell the machinery, tools, equipment and buildings now upon said mining claims, and denies that plaintiffs have any right, title or interest in and to said property, or in and to said mining claims or any part thereof.

This defendant, further answering plaintiffs' [39] complaint in this cause, and as matters of defense, alleges the following:

First. That this defendant and plaintiffs Treat and Smith, on or about the 15th day of May, 1907, entered into the contract set forth in plaintiffs' complaint herein, and marked Plaintiffs' Exhibit "A," and defendant, in accordance with the terms of said contract, thereafter brought to Valdez, and delivered to plaintiff Smith five tons of ore, more or less,

which said ore defendant mined from the Mystic No. 1 lode claim; that plaintiff Smith, on behalf of himself and plaintiff Treat, took charge of said ore and, as said Smith subsequently informed defendant, shipped the same to a smelter in California; that said Smith thereafter informed defendant that the net returns on said ore were about Thirty-five Dollars per ton, but defendant has never received any payment of money or other reimbursement from or by reason of said smelter returns and that said Smith has retained possession of the smelters' accounting for said ore, and, to the best information and belief of defendant, still has the same in his possession.

Second. That after entering into said contract of the 15th day of May, 1907, and between said date and the 9th day of July, 1908, this defendant continued to work in the development of said Mystic No. 1 lode mining claim, and other adjacent claims described in plaintiffs' complaint, in paragraph I of said complaint, and by said work greatly increased the showing of valuable ore thereon and the value of said mining claims; and plaintiffs Treat and Smith were by defendant informed of the increased value of said mining claims, during said period, and said Treat and Smith during said period, repeatedly urged this defendant to incorporate a company for the purpose of operating and developing said claims and placing reduction works thereon, at which times said plaintiffs stated that they could quickly and easily sell sufficient of the treasury stock of such a corporation to finance the accomplishment of all of said purposes,

and that they, said Treat and Smith, knew [40] persons in Valdez, Alaska, who would buy said stock, and at the time the contract described and set forth in paragraph V of plaintiffs' complaint was entered into, said Treat and Smith represented and promised to this defendant that they would and could, within a few days after the execution of said contract, secure subscriptions for the sale of sufficient of the treasury stock of the company to be formed under the terms of said contract, to finance the development and mining operations on said claims and to build a reduction works thereon, and said Treat and Smith at said time further promised and agreed that immediately after the execution of said contract they would proceed to secure such subscriptions to said stock and to comply with all the terms of said contract, and that defendant entered upon said contract relying upon and in consideration of said promises and representations of said plaintiffs Treat and Smith.

That said Treat and Smith failed utterly to secure the subscriptions to the treasury stock of said corporation by them agreed to be secured, and failed to carry out any of the terms of said contract, excepting only that said Treat and Smith, on or about the 21st day of July, 1908, drew up or caused to be drawn articles of incorporation of a company, designated in said articles as the Mystic Gold Mining Company, in accordance with the terms of said contract, which said articles of incorporation were, on or about said 21st day of July, 1908, executed by defendant and by said Treat and Smith; that at the time of executing the articles of incorporation aforesaid, this

defendant also signed an agreement to deed to the said Mystic Gold Mining Company the said mining claims, for and in consideration of the issuance to defendant of all the capital stock of said corporation, and to donate to said corporation twenty per cent of said stock, or forty thousand shares, said shares to be sold by said corporation, or so much thereof as might be necessary to raise sufficient money to develop said mining property and install a reduction plant thereon; which said articles of incorporation and said agreement to deed said mining claims were, after being signed as aforesaid, left by defendant in the hands of plaintiffs [41] Treat and Smith. That about two months after the execution of said contract of July 9, 1908, plaintiffs Treat and Smith informed this defendant that they could not carry out their part of said contract, and thereafter, in the fall of 1908, plaintiffs Treat and Smith asked this defendant to pay them the money he owed them, if possible, and urged defendant to sell his said mining claims in order that he might be enabled to repay them said money from the proceeds of such sale; that defendant refused to sacrifice his said property as requested by said plaintiff, but specifically agreed to and with said Treat and Smith that said contract of July 9, 1908, should be abandoned and that said Treat and Smith should hold the mining claims and said real property of defendant as security for the money formerly owing by defendant to said Treat and Smith from the payment of which said money defendant was to have been released under the terms of said contract of July 9, 1908, and it was thereupon

mutually understood and agreed, by and between this defendant and said plaintiffs Treat and Smith that in consideration of the mutual abandonment of said contract and all rights thereunder, the liens theretofore held by said Treat and Smith against the property of defendant were revived, and that all of said parties stood mutually as if said contract of July 9, 1908, had never been entered into, and that the same was void and of no further effect, and said plaintiffs Treat and Smith, to the best information, knowledge and belief of this defendant, asserted thereafter no right or claim to said mining property of this defendant, or to any interest therein other than the aforesaid lien, until about the month of June, 1909, at which said time one A. J. Crane and one B. F. Millard were negotiating with this defendant with a view to leasing or purchasing the said mining claims of defendant.

Third. That shortly prior to the 5th day of June, 1909, the plaintiffs Treat and Smith represented to this defendant that, in view of the length of time defendant had used the money by them advanced for the shipment of ore from said mining claims, and of the [42] many services rendered by them, and of the efforts made by them to finance the development and operation of the mining property of defendant. It was right and fair that said Treat and Smith should be given an interest in said mining claims, and said Treat and Smith at said time further represented to this defendant that their said services, and the lending by them to defendant of the money aforesaid amounted practically to a grubstake, all of

which said representations defendant then and there denied ; that in order to settle the demands of plaintifffs Treat and Smith to an interest in the mining claims of defendant, and in order that said demands might not delay or prevent this defendant from disposing of his said mining claims to said A. J. Crane or to said B. F. Millard, this defendant on or about the 5th day of June, 1909, asked of plaintifffs Treat and Smith what they would take in full satisfaction of all their claims and demands against this defendant and of their alleged rights or interest in and to the said mining claims of defendant, and at that time the plaintifffs Treat and Smith stated that they would accept in full satisfaction of all their claims and demands against this defendant and of all their alleged rights or interest in and to the mining claims of defendant, fifteen per cent of the royalties that might be paid to said defendant under the terms of a proposed option of lease to all of said mining claims, the negotiations for which said option of lease were at that time then pending between this defendant and said A. J. Crane ; and it was thereupon specifically understood and agreed by and between this defendant Ellis and said plaintifffs Treat and Smith, that in consideration of said defendant transferring to said plaintifffs Treat and Smith fifteen per cent of all royalties by said defendant to be received under the terms of the said proposed option to lease the said mining claims of defendant the said plaintifffs Treat and Smith would accept said fifteen per cent of said royalties in full satisfaction of all their alleged rights, title or interest in and to

said mining claims or any of them, and in full satisfaction of all claims that said Treat and Smith, or either of them, had against said defendant, and said [43] Smith further agreed, in consideration of his share of said fifteen per cent of said royalties, to act as the attorney and legal adviser of said defendant in all matters appertaining to said option of lease and to the royalties derived thereunder.

Fourth. That, pursuant to the agreement set forth in the third paragraph of defendant's affirmative defense hereinabove, on the 5th day of June, 1909, said plaintiff Smith drew or caused to be drawn the option to lease between defendant and plaintiffs Treat and Smith, as parties of the first part, and said A. J. Crane, as party of the second part, a copy of which said option to lease is attached to plaintiff's complaint herein and marked Plaintiff's Exhibit "B"; and that, pursuant to the said agreement, said plaintiff Smith thereafter, on or about the 23d day of July, 1909, drew or caused to be drawn a lease of each and all of said mining claims to B. F. Millard, said Millard having theretofore become the assignee by mesne conveyances, of the option to lease the said mining claims of defendant granted to said Crane on the 5th day of June, 1909, as above stated, a copy of which said lease to B. F. Millard is attached to plaintiffs' complaint herein and marked Plaintiffs' Exhibit "C"; that at the time of the execution of said lease to said Millard, this defendant remonstrated with said plaintiffs Treat and Smith against the description in said lease of said Treat and Smith as owners of an interest in said mining

claims, at which time said Smith assured this defendant, as his, defendant's, attorney, that such description of said Treat and Smith was merely for the purpose of assuring to said Treat and Smith the percentage of royalties by defendant agreed to be transferred to them, that it was necessary for said Treat and Smith to be described in said lease as such owners in order that said Smith, in accordance with his agreement so to do, might at all times protect the interests of this defendant under said lease, and that he might also protect the interest of said Treat and Smith thereunder; and said Smith further stated that nothing in said lease contained would serve to convey to, or to give to said Treat or to said Smith, any right or interest in or to said mining [44] claims, or in and to any machinery or other property placed upon said mining claims, and said Smith specifically represented to defendant that the only right said Treat and Smith acquired by virtue of said lease was the amount of royalty in said lease set forth as to be paid to said Treat and Smith, and that at the termination of said lease the said instrument would be void and of no further effect; and that relying upon the said assurances and representations of said Smith this defendant, on the 23d day of July, 1909, executed the contract of lease to said Millard, described in Plaintiffs' Exhibit "C";

Fifth. That, after the execution of the aforesaid option of lease, of June 5, 1909, and prior to the execution of the contract of lease to B. F. Millard, of July 23d, 1909, this defendant requested plaintiff Treat to satisfy of record the mortgage executed

and delivered by defendant to said Treat, as set forth in paragraph IV of this answer; and at or about the same time defendant requested said Treat and Smith to surrender and cancel the agreement and mortgage entered into on the 15th day of May, 1907, between this defendant and said Treat and Smith, and described in plaintiffs' complaint as "a contract in writing concerning 'Mystic No. 1' lode claim," a copy of which said contract and mortgage is attached to said complaint, marked Plaintiffs' Exhibit "A," and that said plaintiff Treat and said plaintiff Smith, agreed, when so requested as aforesaid by defendant, to see that said mortgage, delivered to said Treat by said defendant as aforesaid, was satisfied of record, and to cancel and surrender to defendant the said contract and mortgage entered into on the 15th day of May, 1907, between defendant and said Treat and Smith, but that said Treat and Smith wholly failed and neglected to satisfy of record the said mortgage, or to cancel and surrender the said contract and mortgage of May 15th, 1907, and when again thereafter requested so to do, said Treat and Smith informed this defendant that it would be soon enough to cancel said instruments when the plaintiffs Treat and Smith had been fully reimbursed all money advanced by them to [45] defendant, out of the royalties to be paid under the terms of the aforesaid lease to B. F. Millard, of July 23, 1909; that during the life of said lease to B. F. Millard, and under the agreement entered into between this defendant and plaintiffs Treat and Smith on the 5th day of June, 1909, as set forth in the Third para-

graph of this affirmative defense, the plaintiffs Treat and Smith have received in royalties from the Cliff Mining Company more than Seven Thousand Dollars, but that said Treat and Smith have never satisfied of record the aforesaid mortgage, nor cancelled or surrendered the aforesaid contract and mortgage, of May 15th, 1907, nor released this defendant from the obligations of either of said instruments by any written release.

Sixth. That said plaintiff Smith has been absent from the Territory of Alaska for more than a year prior to the termination of said lease and the cessation to operate thereunder by the said Cliff Mining Company, and during said absence from the Territory of Alaska, said Smith has failed and neglected to protect the interests of this defendant in matters pertaining to said lease and to said royalties.

That the only right or interest ever owned or held by plaintiffs Treat and Smith, in or to the said mining claims, or any of them, since the 5th day of June, 1909, was a right to receive, each of them, seven and one-half per cent of the total royalties paid under the terms of, and during the life of said lease, which said interest or right of said plaintiffs Treat and Smith this defendant has at all times acknowledged; and that the only interest of the plaintiff Archibald in or to said mining claims is such interest as said Archibald may have acquired in or to the royalties payable to said Smith under the terms of, and during the life of, said lease.

WHEREFORE, this defendant, having fully answered the plaintiffs' complaint herein and having

shown matters in defense of said suit, which this defendant asks may be declared and held to be a complete bar to the relief asked for herein, this defendant [46] prays (1) that a judgment may be entered dismissing said complaint, with costs against the plaintiffs; and (2) for such other and further relief as may be just and equitable in the premises.

CHAS. G. GANTY,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

I, H. E. Ellis, being first duly sworn, depose and say: That I am the defendant named in the above-entitled action and that the foregoing answer has been read by me and the same is true as I verily believe.

H. E. ELLIS.

Subscribed and sworn to before me this 26th day of June, 1915.

[Seal]

CHAS. G. GANTY,
Notary Public.

My commission expires Oct, 21st, 1917.

United States of America,
Territory of Alaska,—ss.

This is to certify that the foregoing is a true and correct copy of the original herein and of the whole thereof.

Dated this 26th day of June, A. D. 1915.

ANTHONY J. DIMOND,
One of Attorneys for Plaintiffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 28, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [47]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Motion to Strike Portions of Answer.

Come now the above-named plaintiffs and move this Honorable Court for an order to strike from the affirmative answer of the defendant herein the following:

I.

The following quoted portion of the second paragraph of defendant's said affirmative answer, beginning with the fourth word of the fourth line of said paragraph from the top of page ten of the answer and ending with the second word ("contract") on the twenty-fifth line of said page ten, on the ground that the same is sham, frivolous and irrelevant and redundant:

"At which times said plaintiffs states that they could quickly and easily sell sufficient of the treasury stock of such a corporation to finance

the accomplishment of all of said purposes, and that they, said Treat and Smith, knew persons in Valdez, Alaska, who would buy said stock, and at the time the contract described and set forth in paragraph V of plaintiffs' complaint was entered into, said Treat and Smith represented and promised to this defendant that they would and could, within a few days after the execution of said contract, secure subscriptions for the sale of sufficient of the treasury stock of the company to be formed under the terms of said contract, to finance the development and mining operations on said claims and to build a reduction works thereon, and said Treat and Smith at said time further promised and agreed that immediately after the execution of said contract they would proceed to secure such subscriptions to said stock and to comply with all the terms of said contract, and that defendant entered upon said contract relying upon and in consideration of said promises and representations of said plaintiffs Treat and Smith. [48]

That said Treat and Smith failed utterly to secure the subscriptions to the treasury stock of said corporation by them agreed to be secured, and failed to carry out any of the terms of said contract."

II.

The following quoted portion of said second paragraph of defendant's affirmative answer, beginning with the fifth word ("that") on the ninth line from the top of page 11 of said answer and ending with

the word "plaintiffs" on the seventeenth line from the top of said page 11, on the ground that the same is sham, frivolous, irrelevant and redundant:

"That about two months after the execution of said contract of July 9, 1908, plaintiffs Treat and Smith informed this defendant that they could not carry out their part of said contract and thereafter, in the fall of 1908, plaintiffs, Treat and Smith, asked this defendant to pay them the money he owed them, if possible, and urged defendant to sell his said mining claims in order that he might be enabled to repay them said money from the proceeds of such sale; that defendant refused to sacrifice his said property as requested by said plaintiffs."

III.

The following quoted portion of the said second paragraph of defendant's affirmative answer, beginning with the word "but" in the seventeenth line from the top of page 11 of said answer, and ending with the word "effect" in the third line from the bottom of said page 11, on the ground that the same is sham, frivolous, irrelevant and redundant:

"but specifically agreed to and with plaintiffs Treat and Smith that said contract of July 9, 1908, should be abandoned and that said Treat and Smith should hold the mining claims and said real property of defendant as security for the money formerly owing by defendant to said Treat and Smith, from the payment of which said money defendant was to have been released under the terms of said contract of

July 9, 1908, and it was thereupon mutually understood and agreed, by and between this defendant and said plaintiffs Treat and Smith that in consideration of the mutual abandonment of said contract and all rights thereunder, the liens theretofore held by said Treat and Smith against the property of defendant were revived and that all of said parties stood mutually as if said contract of July 9, 1908, had never been entered into, and that the same was void and of no further effect.”

Dated at Valdez, Alaska, this 10th day of July, 1915.

DONOHUE & DIMOND and
LYONS & RITCHIE,

Attorneys for the Plaintiffs. [49]

Service of the foregoing motion to strike acknowledgment this 10th day of July, 1915, by receiving a copy of the same duly certified to by Anthony J. Dimond, one of plaintiffs' attorneys.

CHAS. G. GANTY,
Attorney for the Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jul. 12, 1915. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [50]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Order on Plaintiffs' Motion to Strike.

This matter coming on regularly to be heard on motion of plaintiffs for an order of this Court to strike certain portions of defendant's affirmative answer on the ground that the same is sham, frivolous, irrelevant and redundant matter, and both plaintiffs and defendant being represented in court by their respective attorneys of record, and the Court having heard their arguments, and being fully advised in the premises, therefore,

IT IS ORDERED that the first portion of plaintiffs' motion to strike from the second paragraph of defendant's affirmative answer, beginning with the sixth word on the second line of page 10 of said affirmative answer, and ending with the word contract on the 25th line of said page 10, as follows:

“At which times said plaintiffs states that they could quickly and easily sell sufficient of the treasury stock of such a corporation to finance the accomplishment of all of said purposes, and that they, said Treat and Smith, knew persons

in Valdez, Alaska, who would buy said stock, and at the time the contract described and set forth in paragraph V of plaintiffs' complaint was entered into, said Treat and Smith represented and promised to this defendant that they would and could, within a few days after the execution of said contract, secure subscriptions for the sale of sufficient of the treasury stock of the company to be formed under the terms of the contract, to finance the development and mining operations on said claims and to build a reduction works thereon, and that said Treat and Smith at said time further promised and agreed that immediately after the execution of said contract they would proceed to secure such subscriptions to said stock and to comply with all the terms of said contract, and that defendant entered upon said contract relying upon and in consideration of said promises and representations of said plaintiffs Treat and Smith.

That said Treat and Smith failed utterly to secure the subscriptions to the treasury stock of said corporation by them agreed to be secured, and failed to carry out any of the terms of said contract,"

is hereby granted, and the above-quoted portion of said affirmative answer is hereby ordered stricken from said answer. [51]

It is further ordered, that the remaining portion of plaintiffs' said motion be and the same is hereby denied.

The defendant hereby excepts to the ruling of the

Court in striking said portion of defendant's affirmative answer, and the plaintiff hereby excepts to the ruling of the Court in denying the remaining portion of plaintiffs' said motion to strike, and both of said exceptions are hereby allowed.

Done in open court at Valdez, Alaska, this 28th day of August, 1915.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 30, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 229. [52]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Reply.

Now come the plaintiffs by their attorneys and for reply to defendant's answer filed herein say:

That they deny each and every, all and singular, the allegations and averments contained in said answer excepting so far as the same are consistent with the allegations of plaintiffs' complaint.

Wherefore plaintiffs pray for the relief asked in their complaint.

DONOHOE & DIMOND and
LYONS & RITCHIE,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

Geo. C. Treat, being duly sworn, says he is one of the plaintiffs in this suit; that he has read the foregoing answer and he believes the same to be true.

GEO. C. TREAT.

Subscribed and sworn to before me this 2d day of September, 1915.

JOHN LYONS,
Notary Public.

My commission expires Nov. 27, 1916.

Service of copy admitted Sept. 2, 1915.

CHAS. G. GANTY,
Atty. for Deft.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Sep. 3, 1915. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [53]

[Opinion.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEORGE C. TREAT, EDMUND SMITH and
LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

DECISION.

On May 15, 1907, the defendant Ellis, being the owner of the Mystic lode mining claim, situated on Valdez Bay, entered into an agreement with plaintiffs Treat and Smith whereby they advanced the sum of \$500 for extracting and shipping about five tons of ore from said mining claim to a smelter outside of Alaska.

This agreement, which was in writing, provided that Treat and Smith were to receive back their \$500 and also one-quarter of the net smelter returns, and in case said smelter returns were not sufficient to repay said \$500, said Treat and Smith were to have a lien on the said mining claim to secure the said \$500. The smelter returns did not pay the freight and smelter charges.

Nothing further was done until the 9th day of July, 1908, when the same parties entered into an agreement in writing whereby the defendant Ellis was to deed eight gold mining claims, including the

said Mystic gold mining claim (seven other mining claims evidently having been located by defendant Ellis since May 15, 1907,) to a corporation to be called the Mystic Gold Mining Company. All the capital stock of said corporation was to be issued to Ellis as owner, and he was to transfer to Treat and Smith 20% of the capital stock of said corporation and turn over to the treasury of the corporation 20% of the capital stock, to be sold to pay for development on said [54] claims and establishing a reduction plant on said claims.

In consideration of the 20% of the capital stock issued to Treat and Smith, they agreed to "pay all expenses of incorporating the said company, recording and filing of necessary papers thereon, and receipt in full all claims that said Treat and Smith, or either of them, have against said Ellis"; also Treat and Smith were to give their time and attention in selling the amount of the treasury stock necessary to be sold, and "to give whatever time and attention that may be necessary to the proper organization of said corporation and the sale of said stock."

Mr. Smith, who is an attorney at law, prepared the Articles of Incorporation in quadruplicate, and certain written agreements which Mr. Ellis signed, agreeing to deed to the corporation 20% of the capital stock.

It appears that the said parties were unable to sell any of the stock of said corporation, and no stock was ever issued. The Articles of Incorporation, though signed, were not filed, and the matter rested

until June 5, 1909, when one A. J. Crane secured an option on said mining claims, giving him the right to lease the same for a period of six years. For the first year 20% of the net product of said mining claims and for the remaining five years 25% of the net proceeds of said mining claims was to be paid to the lessors, Ellis, Treat and Smith.

In this option it is further provided that 85% of the said royalty was to be paid to Ellis and 15% to be paid to said Treat and Smith during the life of said lease. The lessee was to erect suitable reduction works on said mining claims and all machinery and improvements were to revert to the owners of said mining claims at the expiration of said lease.

[55]

Said Crane did not carry out the said option but on the 23d of July, 1909, one B. F. Millard, Trustee, who had purchased all the rights of said Crane under said option for the sum of \$400 entered into a lease with the said Ellis, Treat and Smith pursuant to the terms of said option made to the said Crane. This lease to Millard, dated July 23, 1909, provides:

“This Indenture made this 23d day of July, A. D. 1909, between H. E. Ellis, four-fifths owner, George C. Treat and Edmund Smith, each owning ten per cent, all of Valdez, Alaska, parties of the first part, and lessors, and B. F. Millard, Trustee, of Valdez, Alaska, party of the second part, and lessee, Witnesseth”:

The said lessee, Millard, formed a company, called the Cliff Gold Mining Company, erected a stamp mill on said property and mined and milled the ore there-

from with great success, defendant Ellis receiving for his 85% of the royalty something over \$50,000 and plaintiffs Treat and Smith for their 15% of the royalty something like \$7,000. The said lessee quit and surrendered up the possession of said premises under said lease about July, 1914.

The controversy between the parties to this case is whether plaintiffs Treat and Smith have any interest in the said mining claims, including the improvements and machinery situate thereon, or whether they contracted to accept 15% of the royalty payable under the terms of said lease, in return for such interest in said mining claims as they may have owned, legally and equitably, on June 5, 1909, the date of the option agreement to Crane. Plaintiffs Treat and Smith contend that under the agreement to incorporate, dated July 9, 1908, they satisfied their joint claim against Ellis for the \$500 advanced to test the original five tons of ore, and also another indebtedness of some \$261 held by said Treat against said Ellis for a loan theretofore made him.

The undisputed testimony shows that in addition to said \$500 so advanced by Treat and Smith, Ellis did owe said Treat on the 9th [56] day of July, 1908, an indebtedness of \$200, with interest, amounting in all to about \$261, and Smith testifies that he paid Treat one-half of this amount.

The plaintiffs Treat and Smith testify that at the time of entering into the option agreement with Crane, they were the equitable owners of a one-fifth interest in said mining claims, by virtue of said

agreement of July 9, 1908, wherein they were to have 20% of the capital stock of the corporation to be formed as above stated.

In addition to the recitals in the said lease to Millard as to the Treat and Smith ownership, there were various protests in writing, introduced in evidence, served by the lessors Ellis, Treat and Smith, upon the Cliff Gold Mining Company, objecting to certain charges levied against them for improvements made on said property. Several of these written protests are introduced in evidence, all signed by Ellis, Treat and Smith, as owners and lessors.

The plaintiffs Treat and Smith testify that at the time of entering into the Crane option, they claimed, and it was never objected to by the defendant Ellis, that they were entitled to a one-fifth interest in said mining property; that the reason why they agreed to take 15% of the royalty instead of 20% was that the defendant Ellis thought that the royalty was not sufficient and they were willing to surrender 5% of their royalty in order to satisfy Ellis and thus bring about the making of said option and lease, which they considered advantageous, but they insist that at no time did they agree to release or surrender their right to an equitable interest in said property itself, to wit, a one-fifth interest therein.

The defendant Ellis, on the contrary, insists that Treat and Smith on the day of entering into the option agreement with Crane agreed to surrender all of their interest and claim in and to said [57] mining property in consideration of their being paid

the said 15% of the royalty to be received from the operation of said mine under the lease.

Defendant Ellis relies in support of this contention upon a letter introduced in evidence by him, as follows:

“Valdez, Alaska, June 5th, 1909.

Mr. H. E. Ellis,
City.

Dear Sir:

In answer to your inquiry as to what we would take or accept for our fifth interest in the Gold Lode Mining Claims, located by you on North side of Valdez Bay, will say:

That we will accept fifteen per cent net of royalty on lease of property provided the contract of lease is satisfactory, or we will accept twelve thousand five hundred dollars in cash net for our interest in said property.

Very truly yours,
(Signed) GEO. C. TREAT.
EDMUND SMITH.”

This letter is construed by the defendant to mean that the plaintiffs Treat and Smith made, and intended to make, an offer to surrender up all their claim to a one-fifth interest in return for said 15% of the royalty. This letter standing alone might be susceptible to such a construction, as it is somewhat ambiguous in that respect. One thing, however, is clear, and I think the defendant is bound by it, having relied upon and introduced this letter, and that is, at the time of writing this letter the plaintiffs Treat and Smith were the equitable owners of a one-

fifth interest in and to the said mining claims and so recognized by defendant Ellis.

At the time of making the lease to Millard, the lease expressly states that Treat and Smith are each the owners of a one-tenth interest. This, taken together with the written protests signed by Ellis, Treat and Smith, wherein they each assume to be owners and lessors, seems to overcome any doubtful construction that might be given to the said letter signed by Treat and Smith on June 5, 1909. [58]

There is another piece of evidence that is strongly against the defendant's claim in this case. On December 4, 1914, the plaintiff Treat wrote a letter to defendant Ellis, who was then in Denver, Colorado and had been absent from Valdez for nearly a year, calling his attention to the fact that the lease had been surrendered and there was an opportunity to lease the property again, and asking Ellis to write him what he was willing to do. To this letter the defendant Ellis replied as follows:

“1-21-15.

310 Ideal Bldg., Denver, Colo.

Mr. Geo. C. Treat,
Valdez, Alaska.

Friend George:

Yours of Dec. 4 recd. some time since and have put off answering on acc't. of the unsettled nature of things, not knowing whether I would be able to go North immediately or not.

The way things are going I don't know just when I will get started. In regard to a lease I will let

that wait until I get North to make an examination of the property.

Sincerely Yours,

(Signed) H. E. ELLIS."

If the defendant at the time of writing this letter, January 21, 1915, had believed, as he now claims to believe, that he was the sole owner of said property, it does not seem reasonable or natural that he would have written a reply to the letter of Mr. Treat, without making some objection to Treat's clear intimation that he was interested in the further leasing and working of the property.

It seems plain to me that the real essence of this case, the real claim and contention of the defendant, arises not so much from a dispute concerning the facts, as it does over the construction which he now desires to give to the agreement entered into between these parties on the 8th day of July, 1908, wherein it was agreed that Treat and Smith "were to give their time and attention in selling the amount of treasury stock necessary to be sold." Ellis contends that because the financial conditions were such that such treasury stock [59] could not be sold, that the plaintiffs Treat and Smith failed in their obligation and were relegated to their money demand against him, and this, in spite of his later repeated admissions in writing as to the ownership of Treat and Smith of a one-fifth interest.

It will be noticed in this contract for the incorporation of the Mystic Gold Mining Company the plaintiffs Treat and Smith did not positively agree to sell one share of stock, but merely to give their

time and attention in selling the same. A proper, or at least an adequate consideration seems to be the canceling of an indebtedness against Ellis of some \$761 and this brings us down to a consideration of the real equity in this case, as a matter of fairness and adequacy of consideration.

The defendant Ellis, having become used to the receipt of large sums of money in royalty, is evidently much less impressed with the importance of so small an amount as \$500 than he was in May, 1907, when he needed that sum to get a mill test of said property, to ascertain what, if any, value the property had. He refers to this sum as being a "measly \$500" and yet, it might well have been, for all that was then known, that the \$500, was more than the property was worth.

Counsel for the defendant earnestly insists that Ellis is the discoverer of this property and ought to be entitled to all of it, and yet it may be that if it were not for this \$500 advanced by Treat and Smith, that the Cliff mine would be absolutely unknown and unworked to-day.

It seems that there are strong equities in favor of the plaintiffs in this regard. Counsel for the defendant says that the lessee, B. F. Millard, knew this property was of immense value and as the testimony shows, when he went upon it, he said that Ellis had not told him the hundreth part of it, and yet, notwithstanding this, [60] he was given the first opportunity to secure the property but permitted Crane to take it up first. Then later, Crane, who had also been upon and examined the property could

not or did not raise the money to do anything with the property and Millard secured the assignment of his option for so comparatively small a sum as \$400. This does not look as though the property was actually known to be of any great value at that time.

The uncertainties of prospects and mining claims are well known. A property may disclose some very rich surface ore and yet not justify the expenditure of very much money, for either the placing of a mill, or development work upon it.

I can well understand how the defendant Ellis has come to believe very sincerely that he is right in this contention, but it seems clear to me that it is more through his interpretation of the agreement to incorporate than anything else; that he feels that Treat and Smith did not keep their part of the contract because they did not sell the treasury stock and he further feels that they forfeited any right they might have to the specific performance of that agreement. That may be true and yet the plaintiffs be entitled to an equitable interest in said property. Where the party to an action bases his claim, as is sometimes done, on the interpretation or legal effect to be given a contract, he is very apt to construe it in his own favor and be unable to see the other side. An instance of this kind is shown in the interpretation of the lease to Millard, where the defendant Ellis insists that the lessee, Millard, or the Cliff Gold Mining Company, should pay all the expenses of defending a lawsuit by some one claiming the said mining ground adversely to Ellis. It does not seem to me that there is any warrant for such a construction

of any provision in the lease to Millard. There is a provision that they are to keep any one from taking possession of the [61] property, but this, in the absence of clear proof to the contrary, would certainly only apply to trespassers and intruders and not to defend a lawsuit with one claiming to own the property as against the lessors.

I feel satisfied from a careful consideration of all the evidence in this case that the plaintiffs' contention is just and fair and that the defendant has shown in his letter to Treat of January 21, 1915, that he has never come out openly and objected to their claim, but has rather held a sort of mental reservation that he could defeat their claims whenever he wanted to.

I have not thought it necessary to review the oral testimony given in this case, as the written evidence seems to me to be sufficient upon which to base a decision.

The burden of proof is upon the plaintiff to make out his case. In this case, however, the written evidences of plaintiffs' right, in the way of written admissions and acknowledgments on the part of the defendant, are so strong and convincing, that it would seem as though the burden of proof should shift to the defendant to explain away these admissions against interest. This I am not satisfied he has done. I am satisfied that the plaintiffs have made out their case by a preponderance of the evidence.

Counsel for defendant intimates that the defendant is unacquainted with law or business affairs. I

cannot believe that a man of the more than average intelligence of the defendant could have been so misled and deceived as he claims to be. He seems to be fully capable of taking care of himself in any dealings he has shown to have been interested in, and as before said, there is nothing unfair or unconscionable in the plaintiffs' claim for the interest which it is evident their investment of money, when this property was an unknown prospect, may have been and in all human probability was the means of enabling defendant to open it up and develop it into the [62] paying property it afterwards became.

I can come to no other conclusion than that the plaintiffs have judgment as prayed for. Findings and decree may be prepared accordingly.

Dated at Valdez, Alaska, October 13, 1915.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 13, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, Page No. 347. [63]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Findings of Fact and Conclusions of Law.

This cause coming on regularly for trial on the 4th day of October, 1915, before the Court, without a jury, Messrs. Donohoe and Dimond and Lyons & Ritchie appearing as counsel for the plaintiffs, and Chas. G. Ganty appearing as counsel for the defendant, and the Court having heard all the testimony offered by plaintiff and defendant, and having heard the arguments of counsel for the respective sides, and having taken the matter under advisement, and on the 13th day of October, 1915, having rendered his decision in said cause in favor of the plaintiffs in accordance with the prayer of their complaint and against said defendant, NOW MAKES AND FILES his Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.**I.**

The Court finds that on the 15th day of May, 1907, the defendant was the sole and legal owner of those certain eight (8) lode mining claims, situate on the northerly [64] side of Valdez Bay, between Gold Creek and Shoups Bay in the Valdez recording precinct, Territory of Alaska, named and described as follows:

The Mystic No. 1 lode claim, notice of location of which is of record in Book K of Mining Locations, at page 506, of the records of said Valdez recording precinct, at Valdez, Alaska.

The Mystic No. 2 lode claim, notice of location

thereof being of record in said Book K, at page 505, of said records.

The Mystery No. 1 lode claim, notice of location thereof being of record in Book O of Mining Locations, at page 452, of said records.

The Mystery No. 2 lode claim, notice of location thereof *being record* in said Book O, at page 453, of said records.

The Mystery No. 3 lode claim, notice of location thereof being recorded in said Book O, at page 605, of said records.

The Parallel No. 1 lode claim, notice of location thereof being of record in said Book O, at page 607, of said records.

The Parallel No. 2 lode claim, notice of location thereof being of record in said Book O, at page 606, of said records.

The High Bar lode claim, notice of location of which is of record in said Book O, at page 451, of said records.

That the legal title to each and all of said mining claims ever since the said 15th day of May, 1907, has been and now is in the name of said defendant.

II.

That on the 15th day of May, 1907, the defendant Ellis and plaintiffs Treat and Smith entered into a contract, in writing, whereby plaintiffs Treat and Smith advanced to defendant Ellis the sum of \$500 for the purpose of enabling the said Ellis to develop said mining claims and ship ore therefrom and under the terms of said contract, among other things, plaintiffs Treat and Smith were given a mortgage on said

mining claims to secure them for the repayment of said \$500. [65]

III.

That on the 9th day of July, 1908, defendant Ellis was then indebted to plaintiffs Treat and Smith for said sum of \$500 and was indebted to plaintiff Treat in the further sum of \$261; that on said date defendant Ellis and plaintiffs Treat and Smith entered into a written contract concerning said mining claims wherein and whereby it was agreed by and between the parties thereto to organize a corporation under the laws of Alaska for the purpose of owning and operating said mining claims, and it was agreed in said contract that upon its organization that the said Ellis would deed to said corporation all of said mining claims in consideration of said corporation issuing to him the full amount of its capital stock, and he, the said Ellis, would thereupon transfer to plaintiffs Treat & Smith twenty per cent (20%) of said capital stock, and that he, the said Ellis, would also surrender twenty per cent (20%) of said capital stock to said corporation to be used as treasury stock of said corporation, and thereupon plaintiffs Treat and Smith released and satisfied their claim against the said defendant Ellis for the said sum of \$500, and plaintiff Treat satisfied and released the said Ellis from the further claim that he then held against him amounting to \$261.

IV.

That shortly thereafter said defendant Ellis and said plaintiffs Treat and Smith made and executed articles of incorporation of said corporation but on

account of them being unable to secure subscriptions for the treasury stock of said corporation said articles of incorporation were not filed; that during the time intervening between the 9th day of July, 1908, and the 5th day of June, 1909, plaintiffs Treat and Smith were [66] at all times ready and willing and able to perform their part of the contract of July 9th, 1908, and during said time made repeated and many efforts to interest parties in said corporation and to sell the treasury stock of said corporation.

V.

That on the 5th day of June, 1909, one A. J. Crane was interested in said mining claims and proposed to take an option for a six years' lease on said mining claims, under the terms of which lease the said Crane was to pay to the owners of said mining claim twenty per cent (20%) royalty for the first year and twenty-five per cent (25%) royalty for the remaining years of said lease; that on said date, and previous to entering into said option contract with the said Crane, the defendant and plaintiffs Treat and Smith, held several conferences and discussions in regard to their respective interests in said property; that on said date, and before the execution of the option contract, with said Crane the said defendant Ellis and said plaintiffs Treat and Smith agreed that the said plaintiffs Treat and Smith owned an equitable one-fifth ($1/5$) interest in each and all of said mining claims, and thereupon, in order to induce the said defendant Ellis to enter into said option contract with the said Crane, the said plaintiffs

Treat and Smith agreed that during the life of said lease they would accept as the royalty for their said one-fifth ($1/5$) interest in each and all of said mining claims, fifteen per cent (15%) of the royalty to be paid instead of twenty per cent (20%) which they would be entitled to as owners of an undivided one-fifth ($1/5$) interest in each and all of said claims; that [67] thereupon the said defendant Ellis agreed that the plaintiffs Treat and Smith owned an undivided one-fifth ($1/5$) interest in and to all of said mining claims, and thereafter, and on said date, said defendant Ellis and said plaintiffs Treat and Smith, as owners of said mining claims, entered into said option contract with the said A. J. Crane.

That thereafter one B. F. Millard purchased of the said A. J. Crane said option contract, and on the 23d day of July, 1909, entered into a lease pursuant to the terms and conditions of said option contract with the said defendant Ellis and said plaintiffs Treat and Smith, in which lease it was specifically stated that the said defendant H. E. Ellis owned a four-fifths interest ($4/5$) in and to each and all of said eight mining claims, and said plaintiff Geo. C. Treat owned an undivided one-tenth ($1/10$) interest in and to each and all of said mining claims and said plaintiff Edmund Smith owned an undivided one-tenth ($1/10$) interest in and to each and all of said eight mining claims, which said lease was made, executed and delivered by the said defendant Ellis and said plaintiffs Treat and Smith as owners in the proportions above stated of said mining claims and as lessors in said lease.

That shortly thereafter the said B. F. Millard sold, assigned and transferred said lease to the Cliff Mining Company, a corporation, and thereupon the said Cliff Mining Company went into possession of each and of all of said mining claims and mined and operated the same pursuant to the terms of said lease and until on or about the month of July, 1914. That during the time the said Cliff Mining Company was so operating the said property the lessors in said lease at many and various times served written notices upon the said Cliff Mining Company, all of which said notices were signed by the defendant Ellis and [68] by plaintiffs Treat and Smith and each and all of said notices recited that the signers thereof were the owners of each and all of said mining claims.

That under the terms of said lease the lessee, B. F. Millard and his assignee, the Cliff Mining Company, agreed and stipulated that all machinery, tools, equipment, buildings and other improvements placed upon said mining claims during said lease should remain upon the said property at the expiration thereof and become the property of the owners or lessors named in said lease; that while the said Cliff Mining Company was so operating said mining claims it placed upon the same a large quantity of machinery, tools and equipment, buildings and other improvements of the value of more than \$25,000, and the same was left upon said property when the said Cliff Mining Company surrendered said lease and said mining claims to the lessors named in said lease, and said machinery, tools, equipment, buildings and

other improvements are now upon said claims.

VI.

That on or about the 3d day of January, 1913, plaintiff Logan Archibald purchased from plaintiff Edmund Smith an undivided one-half ($\frac{1}{2}$) interest of the said Edmund Smith's interest in and to each and all of said mining claims and is entitled to all the rights and privileges accruing to the said Smith by reason of contracts heretofore mentioned and set out in plaintiff's complaint, including the lease dated July 23, 1909, and that the said plaintiff Logan Archibald is now, and ever since the 3d day of January, 1913, has been the owner of a one-half interest in and to all of said property belonging to said plaintiff Smith.

VII.

That defendant Ellis during all the time between the 9th day of July, 1908, and the month of February, [69] 1915, did not in any manner dispute the claim of plaintiffs to an ownership of an undivided one-fifth interest in and to each and all of said mining claims and in and to all the machinery, tools, equipment, buildings and other improvements placed thereon by the said Cliff Mining Company; that since the month of February, 1915, the defendant Ellis has denied, and still denies, the right and title of plaintiffs, and each of them, in and to any interest whatever in said mining claims or the said machinery, tools, equipment, buildings and other improvements placed thereon.

Made and filed this 16th day of October, 1915.

FRED M. BROWN,

Judge.

CONCLUSIONS OF LAW.

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

I.

That by virtue of the contract of the 9th day of July, 1908, plaintiffs George C. Treat and Edmund Smith each became the equitable owner of an undivided one-tenth ($1/10$) interest in and to each and all of the mining claims *descriing* in Finding No. 1, and in plaintiff's complaint, and that defendant George C. Treat ever since has been, and now is, the equitable owner of an undivided one-tenth ($1/10$) interest in and to each and all of said mining claims and in and to all the machinery, [70] tools, equipment, buildings and other improvements thereon. That from the 9th day of July, 1908, until on or about the 3d day of January, 1913, plaintiff Edmund Smith was the owner of an undivided one-tenth ($1/10$) interest in and to each and all of said mining claims; that on the 3d day of January, 1913, the said Edmund Smith, by deed, conveyed to plaintiff Logan Archibald an undivided one-half of his interest in and to each and all of said mining claims; that ever since the 3d day of January, 1913, the said Edmund Smith and the said Logan Archibald have been, and now are, each the owner of an undivided five per cent (5%) or a one-twentieth ($1/20$) interest in and to each and all of said mining claims, the machinery, tools, equipment, buildings and other improvements thereon, and that said plaintiffs should be decreed to be such owners in said property.

II.

That it be decreed that defendant within ten (10) days from the entry of decree be required to convey to plaintiff George C. Treat an undivided one-tenth ($1/10$) interest in all of said property, and to Edmund Smith an undivided one-twentieth ($1/20$) interest in all of said property, and to plaintiff Logan Archibald an undivided one-twentieth ($1/20$) interest in all of said property, and that in case said defendant fails or neglects to make, execute and deliver such a conveyance then that said decree, shall upon being recorded, constitute and be a conveyance of said respective interests to said plaintiffs.

III.

That defendant H. E. Ellis, his agents, attorneys and employees, be forever enjoined and restrained from disputing [71] or in any manner contesting the rights of each of said parties to the interest in said property as heretofore stated, and that they, and each of them, be also forever enjoined from denying plaintiffs, and each of them, the right of possession and enjoyment of said property.

IV.

That plaintiffs have judgment against defendant for their costs and disbursements in this suit.

Done in Open Court this 16 day of October, 1915.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 16, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 362. [72]

*In the District Court for the Territory of Alaska
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Decree.

This cause coming on regularly for trial on the 5th, 6th and 7th days of October, 1915, before the Court sitting as a Court of Equity. Donohoe & Dimond and Lyons & Ritchie appearing for plaintiffs and Chas. G. Ganty appearing for the defendant; and the Court having heard all the evidence and the argument of counsel for the respective parties, and reserving his decision for a future date; and having fully considered the matter; on the 13th day of October, 1915, filed his decision in writing in said cause; and on the — day of October, 1915, having duly made, entered and filed in writing his Findings of Fact and Conclusions of Law:

NOW THEREFORE, in accordance with said decision and said Findings of Fact and Conclusions of Law, it is ORDERED, ADJUDGED and DECREED, as follows:

First. That plaintiff George C. Treat is the owner of [73] and entitled to the immediate possession of an undivided one-tenth (1/10) interest; that

plaintiff Edmund Smith is the owner of and entitled to the immediate possession of an undivided one-twentieth ($1/20$) interest; that plaintiff Logan Archibald is the owner of and entitled to the immediate possession of an undivided one-twentieth ($1/20$) interest; all in and to those eight (8) certain lode mining claims situated on the northerly side of Valdez Bay between Gold Creek and Shoups Bay in the Valdez Recording Precinct, Territory of Alaska, named and described as follows:

The Mystic No. 1 lode claim, notice of location of which is of record in Book K of Mining Locations, at page 506 of the records of said Valdez recording precinct, at Valdez, Alaska.

The Mystic No. 2 lode claim, notice of location thereof being of record in said Book K, at page 505, of said records.

The Mystery No. 1 lode claim, notice of location thereof being of record in Book O of Mining locations, at page 452 of said records.

The Mystery No. 2 lode claim, notice of location thereof being recorded in said Book O, at page 453, of said records.

The Mystery No. 3 lode claim, *note* of location thereof being recorded in said Book O, at page 605, of said records.

The Parallel No. 1 lode claim, notice of location thereof being of record in said Book O, at page 607, of said records.

The Parallel No. 2 lode claim, notice of location thereof being of record in said Book O, at page 606, of said records.

The High Bar lode claim, notice of location of which is of record in said Book O, at page 451 of said records, together with all machinery, equipment, tools, buildings and improvements of every kind and nature now upon said mining claims or either of them.

Second. That defendant H. E. Ellis be, and he is hereby, required within 10 days from the entry of this decree to convey to plaintiff George C. Treat an undivided one-tenth ($1/10$) interest in and to all of said property; to Edmund Smith an undivided one-twentieth interest in and to all of said property and to Logan Archibald an undivided one-twentieth interest in and to all of [74] said property; and in case that said defendant H. E. Ellis fails or neglects to make, execute and deliver such a conveyance then that this decree shall stand in lieu thereof and shall be of the same force and effect for the purpose of vesting in each of the said parties, to wit, Geo. C. Treat, an undivided one-tenth ($1/10$) interest; Edmund Smith, an undivided one-twentieth ($1/20$) interest; and Logan Archibald an undivided one-twentieth ($1/20$) interest; all in and to each and all of said mining claims, together with all the machinery, tools, equipment and improvements thereon, and that this decree shall have the purpose of said conveyance, being treated as a deed properly executed and delivered by the said H. E. Ellis to the said Geo. C. Treat, Edmund Smith and Logan Archibald for their respective interest in the property hereinbefore described.

Third. That defendant H. E. Ellis, his agents, at-

torneys and employees are hereby and forever enjoined and restrained from in any manner contesting the rights of said Geo. C. Treat, Edmund Smith and Logan Archibald to their interests in said property as heretofore stated and that they, and each of them, be forever enjoined from denying the rights of the said Geo. C. Treat, the said Edmund Smith, and the said Logan Archibald, or their heirs or assigns the right of possession and enjoyment of said property.

Fourth. That the said H. E. Ellis, his agent, attorneys and employees are hereby commanded to let the said Geo. C. Treat, into the immediate possession and enjoyment of an undivided one-tenth interest in and to all of said property, and to let the said Edmund Smith into the immediate possession and enjoyment of an undivided one-twentieth ($1/20$) interest in and to all of said property, and to let the said Logan Archibald into the immediate [75] possession and enjoyment of an undivided one-twentieth ($1/20$) interest in and to all of said property.

Fifth. That the plaintiffs do have judgment against said defendant in the sum of \$89.55 for their costs and disbursements incurred in this action; that said costs and disbursements shall be taxed by the clerk of this court and when so taxed shall be entered in this decree and thereupon that execution issue against said defendant for said costs and disbursements.

Done in open court this 16th day of October, 1915.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 16, 1915, Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 365. [76]

[Order that Defendant Have Until February 15, 1916, to File Bill of Exceptions and Fixing Amount of Bond on Appeal.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

**ORDER EXTENDING TIME TO FILE BILL OF
EXCEPTIONS.**

Upon the application and motion of the attorney for defendant herein, and the attorneys for the plaintiffs herein being present and consenting thereto; and it appearing that the court stenographer has not been able to spare sufficient time for the completion of the record on appeal herein, and that he will be unable to complete said record by the 1st day of February, 1916;

And the attorneys for plaintiffs and the attorney for defendant having stipulated and agreed in open court that the Appeal Bond herein be fixed at \$1000.

and that such bond shall be and is sufficient in amount for all purposes pertaining to said appeal:

IT IS ORDERED that the defendant have until the 15th day of February, 1916, to file his bill of exceptions and record for appeal herein and settle the same, and that the appeal bond herein be fixed at \$1000.

Done in open court this 7th day of December, 1915.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 8, 1915. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 461. [77]

**Order Extending Time to [February 25, 1916, to]
File Bill of Exceptions.**

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Now on this day for good cause shown,—

IT IS ORDERED that the time to file and settle the Bill of Exceptions in this cause be and the same is hereby extended from the fifteenth to the twenty-

fifth day of February, 1916.

Dated this 15th day of February, 1916.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 15, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 472. [78]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Stipulation as to Record, Abbreviating Exhibits, etc.

It is hereby stipulated by counsel for the parties respectively in the above-entitled cause that the following may be substituted, or omitted from the record on appeal, to wit:

1. From the Transcript of the Evidence Plaintiffs' Exhibits "A," "B," "C," and "D" may be omitted, as the same form a part of plaintiff's complaint and are part of the record.

2. It is further agreed that in lieu of Defendant's Exhibit 10, consisting of files in Case #607, Ellis v. Gold Bluff Mining Company, the following statement of facts be substituted and that this statement

be incorporated in the Bill of Exceptions in lieu of said exhibit 10, to wit:

First. That said cause was regularly brought before the District Court for the Territory of Alaska, Third Division, on complaint filed February 22, 1913.

Second. That in said cause H. E. Ellis was the sole plaintiff and the Gold Bluff Mining Co. the sole defendant, and no appearance was made by any other person. The issues in the case at bar were in no way involved, directly or indirectly.

Third. That in the complaint in said cause No. 607 the plaintiff [79] therein, H. E. Ellis, alleged himself to be the lawful owner and entitled to the possession of the Mystic No. 1 and No. 2, Mystery No. 3 and Parallel No. 2 lode mining claims, which said claims are in controversy herein. Said Gold Bluff Mining Co. claimed part of the ground included in the above-named claims, and had applied for patent for same together with other land included in its claims. H. E. Ellis, for himself alone, had filed an adverse claim, and brought suit to determine right of possession.

Fourth. The final decree, entered in said cause November 17, 1913, declared said H. E. Ellis to be the owner and entitled to the possession of a part of the ground in dispute with the Gold Bluff Mining Co., describing the same by metes and bounds, and decreed the remainder of the disputed ground to the Gold Bluff Mining Co., each party relinquishing to the other the land decreed to the other. This decree was entered pursuant to stipulation of the parties.

3. It is further agreed that in lieu of Plaintiff's

Exhibit "H" the following statement of facts may be substituted and that this statement be incorporated in the bill of exceptions in lieu of said exhibit "H," to wit:

First. That said exhibit "H" was a mortgage given to secure the payment of \$200 drawn in the usual form, covering a lot and frame building situated in the town of Valdez, Alaska, owned by H. E. Ellis, which said mortgage was duly recorded Nov. 12, 1906.

Second. That in said mortgage Geo. C. Treat was named as mortgagee and H. E. Ellis as mortgagor.

DONOHUE & DIMOND and
LYONS & RITCHIE,

Attorneys for Plaintiffs and Appellees.

CHAS. G. GANTY,
Attorney for Defendant and Appellant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 15, 1916. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [80]

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B—Option Agreement—June 5, 1909—between Ellis, Treat & Smith and A. J. Crane....		21
C—Lease to Millard, July 23, 1909.....		24
D—Contract—July 9, 1908—between Ellis and Treat & Smith.....		11
E—Letter—April 12, 1912—Ellis, Treat & Smith to Cliff Co.....		33

Number.	Description.	Page.
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8—Letter—Dec. 12, 1911—Ellis, Treat & Smith to Cliff Co.....		61
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[82]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEORGE C. TREAT, EDMUND SMITH and
LOGAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Transcript of Evidence.

BE IT REMEMBERED, that the above-entitled
cause came on duly and regularly to be heard, on

Tuesday, October 5, 1915, at ten o'clock A. M., before the Honorable FREDERICK M. BROWN, Judge of said Court:

The plaintiffs herein being represented by their attorneys and counsel, Messrs. Donohoe & Dimond and Messrs. Lyons & Ritchie.

The defendant herein being represented by his attorney and counsel Charles G. Ganty, Esq.

Opening statement having been made to the Court by Mr. Donohoe on behalf of the plaintiffs and by Mr. Ganty on behalf of the defendant, the following additional proceedings were had and done, to wit: [83*—1†]

[Testimony of Edmund Smith, on His Own Behalf.]

EDMUND SMITH, one of the plaintiffs, being first duly sworn, testified in his own behalf, as follows:

Direct Examination by Mr. Donohoe.

Q. You are one of the plaintiffs in this case?

A. Yes, sir.

Q. Where did you reside from the year 1907 until 1912, or thereabouts? A. In Valdez, Alaska.

Q. You are acquainted, of course, with your co-plaintiffs Treat and Archibald? A. I am.

Q. And you are acquainted with the defendant Ellis? A. I am.

Q. You are also acquainted with the property described in the first paragraph of the complaint?

A. I am.

Q. When did you first have any negotiations con-

*Page-number appearing at foot of page of original certified Record.

†Original page-number of Transcript of Evidence as same appears in Original Certified Transcript of Record.

(Testimony of Edmund Smith.)

cerning this property with the defendant Ellis?

A. Well, it was a short time prior to the date of the exhibit, in 1907, when the \$500 was advanced to Mr. Ellis.

Q. That exhibit was dated May 15, 1907—that was about the time you first had negotiations with Mr. Ellis?

A. About that time,—it may have been a week or two weeks prior to that time, but it was only a very short time before the execution of the exhibit, I think only a few days.

Q. I hand you a paper, dated May 15, 1907, and ask you if that is the contract that you refer to? (Handing witness paper.)

A. That is the contract.

Q. Now, shortly before the execution of that contract were your [84—2] first negotiations with Ellis? A. The first negotiations I ever had.

Mr. DONOHOE.—We offer this in evidence and ask that it be marked Plaintiffs' Exhibit "A." It is the original of the exhibit "A" in the complaint.

Mr. GANTY.—We admit that as being a copy of the contract.

(The contract is admitted in evidence, without objection, marked Plaintiffs' "A" and reads as follows:

Plaintiffs' Exhibit "A."

(This exhibit is omitted from transcript by stipulation, as being identical with Plaintiffs' Exhibit "A" attached to plaintiffs' complaint, and a part of this record.) [85—3]

(Testimony of Edmund Smith.)

Q. Mr. Smith, were all the arrangements you had with Mr. Ellis in regard to the property in controversy here up to July 15, 1907, embodied in Plaintiffs' Exhibit "A," just introduced in evidence?

A. All up to May 15th—I think that is the date of the instrument—up to May 15th, was all embodied in that contract.

Q. It is embodied in this exhibit?

A. Except I examined some ore with Mr. Treat that Ellis had on exhibition in his home here.

Q. Where did you examine that ore?

A. At Ellis' residence in Valdez.

Q. Just state the circumstances which brought about the execution of this contract of May 15, 1907.

A. Mr. Treat came to my office about that date, a few days prior or possibly the day before, and said that Mr. Ellis wanted to get some money, five hundred dollars, and designated the terms, as I remember it practically as set forth in the contract, and that Mr. Ellis had some ore which we could examine, that came from the property in question, and Ellis afterwards came with Treat to my office. I told Treat if he thought it was all right I would go in with him, and later Ellis and Treat came to my office and we went over to Ellis' residence and there was I would say fifty or a hundred pounds of ore that he said came [86—4] from this property and we examined it, just casually. I don't know at whose request it was we went over to Ellis' residence, but we all went over together and examined the ore.

Q. Did Mr. Ellis at that time make any statement

(Testimony of Edmund Smith.)

as to the amount of development work that had been done on the property?

A. Well, he said that very little development work had been done, and he had brought this ore out, probably fifty or one hundred pounds, possibly two hundred pounds—there was a little bunch of ore on the floor.

Q. Did he state whether there was any other ore mined or on the dump?

A. No, there was not. The purpose of this money was to get out five tons of ore for shipment,—the purpose of this advancement.

Q. Now, upon the execution of this contract of May 15, 1907, did you and Mr. Treat advance to Mr. Ellis the money mentioned in the contract?

A. We did.

Q. And what was done with that money in relation to the property?

A. Well, part of it I imagine was used, and possibly all of it, in getting out this ore. A tunnel was started seventy feet above the original work. The work done prior to that time was of a very—well, very little work; either a tunnel or shaft—I don't think it was over two or three feet, in extent, in depth or into the bank—had been started and it appeared that that was below the high tide line and this money that we put in, as represented to us by Mr. Ellis, he used in driving a tunnel seventy feet above, on the ledge, and getting out some ore.

Q. About how many tons of ore were taken out with this \$500?

(Testimony of Edmund Smith.)

A. There was more ore taken out than was shipped, to the best of my recollection it was either 8,200 or 8,400 pounds of ore that [87—5] was brought out and shipped, but that was selected from probably twice that amount—the best ore that was encountered in this tunnel was selected and shipped.

Q. That ore was sacked?

A. That ore was sacked, yes, sir.

Q. And brought to the dock at Valdez?

A. Yes, sir.

Q. What became of that ore?

A. That ore was shipped to the Selby Smelter, near San Francisco.

Q. The shipment was made by you?

A. The shipment was made by me personally.

Q. Do you remember how long it was after the contract made on the 15th when this shipment was made, about how long?

A. No, I do not. I should say a month or six weeks, probably less time—it was only a short time afterwards.

Q. Did you in the due course of time receive the returns from the Selby Smelter of this ore?

A. I did.

Q. What were the net returns of this ore after paying wharfage at Valdez, transportation to Seattle, transportation to the Selby Smelter and the Selby Smelter's charges for the treatment of the ore?

A. Well, I can't say to a cent; the total value of the ore shipped was \$106 as I remember it. Out of that was the \$20 I had paid for freight to Seattle,

(Testimony of Edmund Smith.)

which was in addition to the \$500 and wharfage, whatever that was, here, wharfage in Seattle and freight from Seattle to Frisco and the transfer and freight from Frisco to the Selby Smelter and the smelter charges—the balance was remitted.

Q. What balance, do you remember, was left after paying those charges [88—6] from the returns of this ore?

A. To the best of my recollection it was in the thirties—my recollection is that it was thirty-six dollars and some cents.

Q. Thirty-six dollars left? A. Yes, sir.

Q. That was the net profit on the ore after it came into your hands on the dock at Valdez?

A. Yes, sir.

Q. Now, did you receive from the Selby Smelter a written statement of their smelter returns?

A. I did.

Q. Did you exhibit those smelter returns to Mr. Ellis? A. I did.

Q. Can you state about when and where you exhibited it?

A. It was immediately after I received it; I can't give the date, but it was returned to me in due course after the ore reached Frisco, within probably two weeks—it might have been a little longer—and I submitted it to both Mr. Treat and Mr. Ellis immediately after its receipt by me.

Q. Where did you submit that to these gentlemen?

A. In my office.

Q. Do you remember any comments made by Mr.

(Testimony of Edmund Smith.)

Ellis or in his presence at that time regarding the ore? A. Yes.

Q. Just state what those conversations were or the substance of them.

A. I can't give the exact words, but it was a surprise to all of us that the smelter had failed to remit to the extent of \$100 per ton at least on the ore. It was all selected ore and from the later returns, I was confirmed in that opinion and Mr. Ellis [89—7] was of the same opinion as Mr. Treat and myself in that regard.

Q. Was anything said at that meeting about getting out any more ore to ship from this Mystic mining claim? A. Yes, there was.

Q. State what it was.

A. The substance of it was that on such returns as that it would not pay to ship any more ore, there was too much leakage, too much loss.

Q. Now, between the time you received the returns of this ore that was shipped to the Selby Smelter and the 9th day of July, 1908, did you and plaintiff Treat and defendant Ellis have any other conversations in regard to this property which you can now recollect?

A. Yes, we had numerous conversations about the property and what could be done with it,—in fact, every week or so I would meet Mr. Ellis on the street or he would be at the office and we would discuss the property.

Q. What became of that written smelter returns you received from the Selby smelter?

(Testimony of Edmund Smith.)

A. I left them in the office, in my office in Valdez, with all other matters that I did not think were important enough to take with me when I removed to Seattle.

Q. In order to have the record clear on that, state what you mean by your office in Valdez and how you came to leave it there?

A. My office in Valdez was opposite the Steamship office, fronting on the frontage to the dock, the Valdez Dock Company; the office was occupied by Mr. Bunnell and myself. When I left I sold my interest in the building to Mr. Bunnell and he remained in the office and all of the papers and records that I had in the office that were not entirely personal or did not relate to matters that might come up on the outside, I left in the office with [90—8] Mr. Bunnell.

Q. And that was the last you have seen of it?

A. That was the last I have seen of it.

Q. And in regard to your office, you were practicing law in the office you speak of? A. Yes, sir.

Q. Up to about 1912? A. May 15, 1912.

Q. And then on that date you went to Seattle where you are still practicing law? A. Yes, sir.

Q. And the office you speak of and the papers you left with Mr. Bunnell were destroyed by fire last July, were they?

A. From the indications of the ground and what I heard it was and it certainly shows the effects of it.

Q. Now what was the reason that this \$36 profit on this ore was not distributed at the time you re-

(Testimony of Edmund Smith.)

ceived the returns on the ore shipped, if it was not distributed?

A. The reason it was not distributed was, the Alaska Steamship Company, but whom it was shipped to Seattle, came in with an additional freight bill on account of the value we placed on the ore and on account of the rate, the four dollars per ton rate, they gave us applying only to one hundred ton lots, they advanced that to ten dollars as I recollect and we valued the ore as I recall it at \$500 a ton, and they added a proportionate charge for all values above \$50 a ton and they presented a bill, as I recall now, for \$96 additional freight.

Q. In addition to what you had already paid?

A. Yes, in addition to what we had already paid.

Q. That claim of the Steamship Company against you remained unadjusted [91—9] until the time of the contract of July, 1908?

A. I don't know whether up to that time or not, but for a long period of time after the shipment and after the returns, I can't give the date, when it was finally abandoned.

Q. Was Mr. Ellis apprised of this additional claim of the Steamship Company? A. He was.

Q. Did he at any time demand the distribution of this small profit on this shipment of ore?

A. Never.

Q. Now, what was the occasion, or what circumstances brought about the execution of the contract of the 9th day of July, 1908, set out in the fifth paragraph of your complaint?

(Testimony of Edmund Smith.)

A. Well, from the time we received the returns, the smelter returns, we were satisfied that it was not profitable to ship to a smelter and we at intervals discussed other ways and means of operating the property and getting our money out of it and Mr. Ellis wanted, of course, to improve and develop the property and we were anxious to get our money, so various methods were suggested which finally resulted in the drawing of the contract of 1908.

Q. At whose suggestion or solicitation was this contract of July 9, 1908, entered into?

A. I can't say as to the solicitation, who solicited it, but it was simply agreed upon, out of the various matters that had been suggested by Mr. Ellis, by Mr. Treat and myself. The exact details of that, I can't say who suggested it.

Q. Now, I understand you to say that you and Ellis and Treat had various conversations and discussions regarding this property previous to the entering into of the contract of July 9, 1908? [92—10]

A. Yes, sir; and various methods were suggested and finally by our combined efforts and suggestions, that contract was evolved out of it, but who suggested the details of that I can't say.

Q. That is what the three of you finally agreed upon?

A. That is what we finally agreed to reduce to writing.

Q. I submit to you a contract dated July 9, 1908, between yourself and Treat on one part and Ellis on

(Testimony of Edmund Smith.)

the other, and ask you if that is the original of the contract?

A. That is the original of the contract, that is, it is one of the originals. All papers that were prepared in this matter were made, so far as it pertained to the three of us, in triplicate; Ellis got a copy, Treat a copy and I took one.

Q. And they were all executed as originals?

A. They were all executed as originals.

Mr. DONOHUE.—We offer this in evidence and ask that it be marked Plaintiffs' Exhibit "D" to keep it from conflicting with exhibits in the complaint.

(Admitted without objection, marked Plaintiffs' Exhibit "D" and reads as follows:)

Plaintiffs' Exhibit "D."

(Copy of this exhibit is omitted from transcript by stipulation, as being identical with copy of contract set forth in Plaintiffs' complaint, paragraph V, and a part of this record.)

Q. Now, at the time of the execution of this contract, marked Plaintiffs' Exhibit "D," what was due and owing to yourself and Mr. Treat jointly from Mr. Ellis in relation to these mining matters?

A. There was the five hundred dollars advanced and the interest on it,—whatever the interest would be, less the small credit from the shipment of the ore and another item—no, that is all; that is all that was due to us jointly.

Q. Did you have personal knowledge from conversations had between [93—11—12] Mr. Ellis

(Testimony of Edmund Smith.)

and yourself and Mr. Treat whether Mr. Ellis at that time was indebted to Mr. Treat in any amount?

A. That was discussed in my presence at the time this contract was drawn; the amount was considerably over—between two and three hundred, \$26, as I remember it, and I gave Mr. Treat my check for half of that amount.

Q. Upon the execution of that contract?

A. Yes, upon the execution of that contract.

Q. Of July 9, 1908? A. Yes, sir.

Q. What was done at the time of the execution of this contract of July 9, 1908, in reference to giving Mr. Ellis any other receipt than this contract for his indebtedness?

A. So far as I know, no other receipts were given. I regarded the contract as a receipt itself—it acknowledged the receipt.

Q. And did Mr. Ellis at that time or any time thereafter demand of you a receipt?

A. Never of me, never demanded anything in addition to that contract.

Q. You say this contract, Plaintiffs' Exhibit "D," was made in triplicate and each of them executed as originals, and one given to each of you three parties?

A. All contracts pertaining to this matter, including this one, were made in that way.

Q. After the execution of this contract, Plaintiffs' Exhibit "D," what was done by you and Mr. Treat, or the three of you, you and Treat and Ellis, in regard to carrying out the terms of this contract?

A. Well, I prepared the Articles of Incorporation

(Testimony of Edmund Smith.)

of the Mystic Gold Mining Company and all other papers that I thought were necessary at that time, including a proposition from Mr. Ellis [94—13] addressed to the Mystic Gold Mining Company, which embodied the agreement of 1908 as to deeding the property to the corporation and accepting stock and the distribution of the stock.

Q. That proposition was, the stock was to be distributed in accordance with the terms of the contract of July 9, 1908?

A. Yes, all of these papers were executed; the articles of incorporation were executed and signed and acknowledged by Mr. Treat, Mr. Ellis and myself, except the proposition which was signed by Mr. Ellis.

Q. Were those articles of incorporation ever filed?

A. They were not.

Q. Why? And why did you take no further steps in the completion of the organization of the corporation?

A. Well, the main reason was to prevent tying up the property in case some other disposition should be deemed more advantageous later on, and another reason was the financial condition of the town. It was the next summer after the Reynolds difficulty here and the town was in bad shape financially. The other acts we did to try to get other parties to take up this treasury stock in a block, Mr. Hubbard—

Mr. DONOHUE.—Never mind that just now.

Q. After the papers for this Mystic Gold Mining Company were drawn up and properly executed, I

(Testimony of Edmund Smith.)

understand you to say you did not file them because of the difficulty you would probably meet with in selling the treasury stock provided for?

A. That is the reason.

Q. And you did not want the property tied up in a corporation when you might want otherwise to dispose of it?

A. That is the reason it was not carried out and deeded over?

Q. Now, how long would you say, what is your best recollection of [95—14] the time that elapsed between the execution of the contract of July 9, 1908, and the execution of these articles of incorporation.

A. It was a few days, it was immediately after the contract.

Q. Would you say within thirty or forty days?

A. Yes, sir, within that time easily.

Q. What efforts did you and Mr. Treat make to procure purchasers for this 20% of the treasury stock of the Mystic Gold Mining Company?

A. Well, we took the matter up with everybody that we thought might be able to handle it. The first person that became interested or intimated he could handle it was Mr. Charles Hubbard.

Q. Just state who Mr. Charles Hubbard was at that time and what his mining connections were?

A. Well, he was one of the incorporators and owners of the Hubbard-Elliott Mining & Development Company; he was a man interested in mining and was interested in the flotation of properties, secur-

(Testimony of Edmund Smith.)

ing capital, etc. He told us he could get the money to take up the treasury stock and went outside for that purpose, but failed to do it.

Q. He failed? A. Yes, sir.

Q. Who next did you have any conversation or negotiations with in order to see if you could sell this treasury stock?

A. We had negotiations with a Mr. Mills who resided here. In company with Mr. Ellis, Mr. Treat and myself took Mr. Mills down to the ground; Treat and I hired a boat and took him down to examine the property; that was shortly after Mr. Hubbard had failed.

Q. Were you able to accomplish anything with Mr. Mills?

A. No, Mr. Mills wanted a lease on the property and we wouldn't [96—15] give it, he was either unable to or at any rate he didn't buy the treasury stock.

Q. Do you remember a conversation which took place on the property at the time you and Mr. Treat and Mr. Ellis took Mr. Mills down there in regard to the ownership of this property and any statements made by Mr. Ellis at that time?

A. Well, I think you refer to the conversation between a party they call Gus here, I don't know what his last name is, the owner of the boat—I remember the conversation and think I can repeat it.

Q. Just state that conversation, as near as you can remember it?

A. At that time it was very difficult to get around

(Testimony of Edmund Smith.)

the tunnel, the mouth of the tunnel where the work was done and going around the edge of this bluff, we all started up the hill, a very narrow place; we got to a narrow point and Ellis stopped and turned around to Gus and he says—

Q. Gus was the boatman that took you down?

A. Gus was the boatman that took us down there, the man that owned the boat, the man we hired to take us down. He said, "Where are you going or what are you doing up here?" and I think I answered and said, "Why, isn't it all right for him to go up with us to the mine?" He says, "No, it is not, but," he says, "you and Treat, if you say so, it is all right, but as far as I am concerned a man has got just as much right to come into my house without my invitation as he has to go into my mining property," and Gus turned around and went back. He said, "You and Treat are interested with me in the property and if you say it is all right, it will go, but it isn't my idea about those things."

Q. Now, this corporation provided for in the contract of July 9, 1908, was never actually completed?
[97—16]

A. No, it never was filed, never was recorded.

Q. Who next after Mr. Mills did you and Mr. Treat endeavor to interest in this property?

A. Mr. Treat brought a Mr. Crane, A. J. Crane, into my office.

Q. Do you remember about what time that was?

A. I can fix the date—it was a few days, possibly a week, prior to the execution of the option to Mr.

(Testimony of Edmund Smith.)

Crane of a lease on the property.

Q. The option is dated the 5th day of June, 1909?

A. It was a few days prior to that, it may have been a week—I don't think it was longer than a week.

Q. What negotiations did you have with Mr. Crane with reference to the property?

A. Well, we first tried to get Crane, who represented that he had a stamp mill that had been purchased for some other property which was not what it was represented to be; he owned a stamp mill and they had money in their treasury. We tried to get Crane to take all this treasury stock and turn in the mill at its value and pay him the balance in cash, and Mr. Crane said he would like to see the property and we arranged it and took him down to the property in company with Mr. Ellis; I didn't go to the property; Treat and Ellis and Crane and I think somebody else went down.

Q. After Mr. Crane returned from examining the property, did you have any further negotiations with him?

A. Yes, considerable, until it resulted in the giving of the option for the lease.

Q. What time of the day was this option executed?

A. It was in the evening; I remember that Mr. Crane and Mr. Ellis had a meeting at seven o'clock in the evening. The boat was [98—17] going out that night and it was after that interview that Ellis came down to the office and he and Mr. Treat and I had some conversation over the matter and I sent out and got a stenographer and it was finished

(Testimony of Edmund Smith.)

that night, as Mr. Crane was going out on the boat that evening.

Q. He was going out to the States?

A. He was going out to the States that night.

Q. Did he go out that night? A. He did.

Q. Some time during the night?

A. Yes, sir—I don't recall just what time the boat sailed.

Q. Now, what negotiations did you and Mr. Treat on the one side and Mr. Ellis on the other have in your office in the town of Valdez on the evening of the 5th day of June, 1909, and shortly previous to the execution of the contract of that date?

A. Mr. Ellis came into the office from his meeting with Crane and says, "What interest do you expect in this property if we carry out this lease." I told him we expected 20% as provided for in the contract, and Mr. Ellis says, "Well, this will save you some work and some expense."

Q. You spoke of the contract; which contract have you reference to?

A. I refer to the contract of July 9, 1908, and we claimed 20% interest in the property. Mr. Ellis, as I stated, said that this would involve less work on our part. We answered by stating that that was true, but it would give him a greater interest in the property, because he would only have 60% if the contract of 1908 was carried out, while under this contract he would have 80%, and he stated then that he wanted to know if we would take our money back with good interest. I told him we would not, that

(Testimony of Edmund Smith.)

we had gone into the matter in the nature of a grub-stake proposition; [99—18] that there was nothing there at the time we put the \$500 into it; that our money had performed all of the work that had been done on it since that time and we certainly wouldn't take a chance of that kind and then just accept our money back. He then stated that his main reason for requesting something of that kind was that he had all of his life had an ambition, since he reached his maturity, to discover, develop, own and operate a mine of his own, and for that reason it was a matter of sentiment with him on the property.

Q. What proposition, if any, did you and Treat finally make to Mr. Ellis at that time in regard to the property in controversy?

A. Well, we were very anxious to get this property developed and something done with it, and Mr. Treat and I retired to another room in the office, and after discussing the matter personally we went back and stated to Mr. Ellis what we would do.

Q. State what that proposition was and what reply Mr. Ellis made to it.

A. That we would insist upon our ownership of 20% interest in the property, but during the life of the lease we would accept 15% of the royalty, or allow Mr. Ellis to take 5% of our royalty for the purpose of compromising and securing the lease and the development of the property.

Q. What reply did Mr. Ellis make to that?

A. He said that was all right. I sent out then for a stenographer.

(Testimony of Edmund Smith.)

Q. In speaking of the lease, you mean the lease then in contemplation with Crane?

A. Yes—this was an option for a lease first; we gave him an option for a lease which was afterwards merged into a lease. I sent out for a stenographer; the papers were prepared and all parties came in and signed it. [100—19]

Q. Who was present at the conversation you have related, where you and Treat made the proposition to Ellis?

A. Just Ellis, Treat and myself.

Q. That conversation took place in your office?

A. That conversation took place in my office in Valdez, Alaska.

Q. About what time?

A. It was after our evening meal; it was along after seven o'clock in the evening; we came back to the office for that purpose, to try to close the matter up.

Q. Now, later you prepared a contract in regard to the option?

A. We prepared an option contract which was signed up that evening and delivered—a copy of it delivered to Mr. Crane and we each took a copy.

Q. This contract, I understand there were four copies of it made, and all executed as originals?

A. All executed as originals.

Q. I hand you a contract entitled, Memorandum of Option Agreement, dated the 5th day of June, 1909, between H. E. Ellis, George C. Treat and Edmund Smith, parties of the first part and A. J. Crane, party of the second part, and ask you if

(Testimony of Edmund Smith.)

this is the contract which you have just testified to as having been executed at that time.

A. That is the contract—it is one of the originals. Ellis at that time was furnished a duplicate of this, which was also executed as an original; so was Mr. Treat and Mr. Crane.

By the COURT.—The Crane contract of June 5, 1909—is that the one on which the subsequent lease was based for six years?

Mr. DONOHOE.—Yes, sir.

By the COURT.—This is the lease that finally went through?

Mr. DONOHOE.—Yes, sir. [101—20]

Mr. RITCHIE.—The Millard lease was practically the same as the Crane lease.

Mr. DONOHOE.—I ask that this Memorandum of Option Agreement be marked Plaintiffs' Exhibit "B," and be admitted in evidence.

It is so marked and admitted. ,

Q. I call your attention to the endorsement on the back of Plaintiffs' Exhibit "B" and ask you to state if you know what that is.

A. Well, the first purports to be an assignment of all rights under this option to Mr. H. W. Judson, signed by Mr. A. J. Crane. The second endorsement is what purports to be an assignment by H. W. Judson to B. F. Millard, witnessed by C. T. Arkins.

Mr. DONOHOE.—You do not question the assignment?

Mr. GANTY.—We do not question the assignment.

The exhibit "B" and endorsements read as follows:

(Testimony of Edmund Smith.)

Plaintiffs' Exhibit "B."

(This exhibit is omitted from transcript by stipulation, as being identical with Plaintiffs' Exhibit "B" attached to plaintiffs' complaint, and a part of this record.)

Q. Was there any discussion at the time of the execution of Plaintiffs' Exhibit "B", which was on the 5th day of June, 1909, regarding the respective ownerships in this property, other than you have testified to?

A. No, nothing that I recall. Of course, there was probably more words used than I have used,—I can't remember each word that was said, but that was the final proposition that was made and accepted.

Q. That proposition was that you and Treat were to retain a 20% interest in the property but that during the life of this lease you would accept 15% of the royalty?

A. Yes, we simply gave up 5% of our interest in the royalty to prevent a lapse or falling down on the proposition. The man seemed to have money or represent money and it seemed to be an opening to develop the property.

Q. You mean by the falling down on the proposition, the proposition [102—21—23] between Crane on the one side and you and Ellis and Treat on the other?

A. Yes; we simply gave up part of our interest in the royalty rather than have the matter fall down.

Q. Now, on the 23d day of July, 1909, did you, Mr. Treat and Mr. Ellis have any further negotiations

(Testimony of Edmund Smith.)

or transactions in relation to this mining property?

A. Isn't that the date of the lease?

Q. That is the date of the Millard lease.

A. Yes, sir; we had some conversation in regard to it.

Q. State any conversation that you can now recall between yourself, Treat and Ellis previous to the execution of what is termed the Millard lease?

A. When Mr. Millard came in with these assignments and requested the lease, I prepared a lease, after discussing some forms of it and some points to be inserted in the lease with Mr. Ellis and Mr. Treat; I prepared this lease and when it was ready, sent for a stenographer and had four copies of it made. The parties were sent for or came in according to previous arrangement—there was Mr. Millard, Mr. Ellis, Mr. Treat and myself; I gave each of them a copy of the lease.

Q. This was the lease that was executed at that time? (Handing witness paper.)

A. That is the lease.

Mr. GANTY.—We admit the lease to Millard.

The lease is marked Plaintiffs' Exhibit "C" and admitted without objection. It reads as follows:

Plaintiffs' Exhibit "C."

(This exhibit omitted from transcript by stipulation, as being identical with Plaintiffs' Exhibit "C" attached to plaintiffs' complaint, and a part of this record.) [103—24—28]

Q. Now, proceed, Mr. Smith, and tell what conversations, if any, took place at the time of the execu-

(Testimony of Edmund Smith.)

tion of Plaintiffs' Exhibit "C."

A. Well, there wasn't very much said in regard to the matter,—each one read the copy which they had; Ellis said that looked all right to him, Millard said it looked all right to him and we stepped around and signed the contract and acknowledged it—signed the lease.

Q. Who was present at that time?

A. There was B. F. Millard, H. E. Ellis, George C. Treat and myself.

Q. You were all parties to this lease?

A. We are all parties to this lease, yes.

Q. I call your attention to the introductory clause of this lease:

"This Indenture, made this 23d day of July, A. D. 1909, between H. E. Ellis, four-fifths owner, George C. Treat and Edmund Smith, each owning ten per cent, all of Valdez, Alaska, parties of the first part and lessors, and B. F. Millard, Trustee, of Valdez, Alaska, party of the second part and lessee, Witnesseth—

Was there any discussion at that time or any criticism made by Mr. Ellis of the portion of this lease which sets out the respective amounts in which the lessors owned this property?

A. Not a word of criticism, either at that time or at any other time; that was drawn in strict accordance with our agreement at the time the option was given.

Q. You mean the option of the 5th day of June?

A. Yes, sir, the option to Crane, the option on

(Testimony of Edmund Smith.)

which the lease is based. And it was put in that way because the royalty was for a different amount, as I explained a moment ago.

Q. Now, you have named all persons who were present as you can recollect when that lease, exhibit "C," was signed?

A. Probaby Mr. Bunnell and Mrs. Lockhart or whoever was employed by us at that time—Mrs. Lockhart I see took the acknowledgment—those people were in the building, were in our office but in my room the only people I can recall were the four mentioned.

Q. And you delivered to Mr. Ellis a copy of this lease and he read [104—29—30] it before he signed it?

A. Read it before he signed it; so did Mr. Millard and Mr. Treat.

Q. And no objections were made whatever to it at that time?

A. None whatever, it was signed and each of them expressed himself that it was all right.

Q. And expressed themselves that they were satisfied, in some way?

A. Just the language they used; I think they said, it looked all right to them and they stepped around and signed it in rotation.

Q. Has Mr. Ellis at any time since the execution of Plaintiffs' Exhibit "C," objected to you in your presence to that portion of the lease which I read and which defined the proportionate ownership of the lessors in the property?

(Testimony of Edmund Smith.)

A. Never, at any time and we paid our portion of permanent improvements on that basis.

Q. Now, you know that shortly after the execution of this lease to Millard that he assigned it to the Cliff Mining Company, do you not? A. Yes, sir.

Q. Do you remember on or about what date that was?

A. No, I do not; I believe it was immediately after that, as soon as the Cliff was organized; it was part of the same transaction.

Q. And what did the Cliff Mining Company do in regard to the property after they took the assignment of the Millard lease?

A. They put a crew of men on the mine, developing the mine, excavating a place for the mill and the installation of the mill—the general development of the property.

Q. Now, up to the point where the Cliff Mining Company took charge of it, on or about the fourth day of August, 1909, how much real development work had been done on the property?

A. Well, within a foot or two, I would say there was 20 ft. of tunnel.

Q. Twenty feet of tunnel all told?

A. Twenty feet of tunnel all told.

Q. And where was that work done, if you know?

[105—30]

A. I can't describe its relation to the corners of the property, the claim it stood on—

Q. In relation to tide water?

A. It was about 70 feet, I judge it was about that

(Testimony of Edmund Smith.)

distance and I have been informed by Mr. Ellis that it was 70 ft. above the mean high tide line.

Q. Do you know when the Cliff Mining Company surrendered the property back?

A. Only from hearsay—some time in August, 1914.

Q. Now, of your own knowledge, what machinery, tools and equipment do you know of the Cliff Mining Company installing on the property?

A. Well, there were two hoists and a stamp mill, two units, a Nissen mill and tools; there was a wharf, bunkhouse and quite a number of small buildings, blacksmith-shop and other buildings that were erected by the Cliff Mining Company.

Q. What was the financial result of the Cliff Mining Company's operations of the property during the time they held possession of it under this lease?

A. It was successful financially.

Q. And the lessors named in the lease received dividends, did they, in accordance with the terms of the lease?

A. I wouldn't say—we don't think we did; we have had several disputes with the company, but we received what royalties they paid us.

Q. Well, from time to time there were little differences as to the interpretation of the lease?

A. Yes, just what should be charged to us; we objected to being charged with the machinery and permanent improvements to the property?

Q. And these matters were taken up and adjusted from time to time?

A. They were not really adjusted—we finally

(Testimony of Edmund Smith.)

dropped the matter, entirely—didn't want to have any litigation over it.

Q. Have you any definite knowledge as to the value of the tools, machinery and equipment left upon the property when the Cliff Mining Company surrendered their possession? [106—31]

A. No, I have not, except knowledge as attorney for the Cliff Mining Company at the time the mill was burned as to the costs of the installation of the new mill and other improvements.

Q. What was the cost of installing the new mill?

A. I was informed it was about \$40,000.

Q. And that was in what year?

A. I believe it was in 1910—there is a contract, however, where we agreed that they might ship to the smelter until the mill was constructed—it gives the date.

Q. For the purpose of refreshing your memory—this contract was dated the 14th day of August, 1911?

A. It was in 1911.

Q. Is that about the time the mill was constructed?

A. That is the time they commenced the construction of the mill—they excavated and a great deal of expense was put into the foundation.

Q. Now, Mr. Smith, did Mr. Ellis at any time since the execution of the contract of July 9, 1908, until the Cliff Mining Company surrendered back the possession of this property ever dispute the right of you and Mr. Treat to a 20% interest in the property?

A. Never to me and I never heard of it.

(Testimony of Edmund Smith.)

Q. Did you and Mr. Treat and Mr. Ellis as owners of this property during the time that the Cliff Mining Company operated it, ever make any written protests to the Cliff Mining Company in regard to their removing the machinery from the property?

A. We did, in regard to the hoist; it was general, but what started it, they were attempting to sell a small hoist which had become inadequate on account of the depth of the mine, and installing a larger one. I went to Mr. Ellis and went to Mr. Treat and stated in accordance with the lease that that should remain on the property, that belonged to the owners of the property and we served a protest against selling any of the property or tools that had been placed on the ground during the lease. [107—32]

Q. Did Mr. Ellis sign this protest with you and Mr. Treat? A. Yes, sir.

Q. I hand you an instrument dated Valdez, Alaska, April 12, 1912, directed to the Cliff Mining Company, signed H. E. Ellis, George C. Treat and Edmund Smith and ask you if that is the protest that was served upon the Cliff Mining Company in that connection?

A. That's it; that is Ellis' signature, Mr. Treat's and my own.

Mr. DONOHUE.—We offer this in evidence.

It is admitted in evidence, without objection, marked Plaintiffs' Exhibit "E" and reads as follows:

Plaintiffs' Exhibit "E" [Letter, April 12, 1912, H. E. Ellis et al. to Cliff Mining Co.].

"Valdez, Alaska, April 12, 1912.

To the Cliff Mining Company,

Gentlemen:

Under the lease held by your company of the mining property known as the Cliff Mine, there is the following provision:

'It is further understood and agreed that all machinery, tools, equipment and improvements placed upon said mining claims by the lessee, his successors or assigns, shall, at the termination of this lease, be left upon the property and become the sole property of the lessors, as part of the consideration hereof, and of said lease.'

Under this provision the owners of the property insist that all machinery, tools, equipments and improvements placed upon the said property during the life of the lease, become the property of the owners as soon as the same is placed upon the property, subject to the right of the use of the same by the Cliff Mining Company, the present owners of the lease. And in case any machinery is changed, or this machinery substituted, the machinery no longer in use by the lessee, should be stored in a proper place, or delivered to the owners of the said property, and that the Cliff Mining Company had no right or authority to sell or dispose of any machinery, tools, equipment or improvements which have

(Testimony of Edmund Smith.)

been placed upon the said property.

Very truly yours,

H. E. ELLIS.

GEO. C. TREAT.

EDMUND SMITH."

Q. Now, Mr. Smith, assuming that the 'Cliff Mining Company had sold this hoist to which you are testifying, would that have increased the royalty that would have been paid on the lease?

A. It would have increased the royalties, but it would decrease the value of the property when it was turned back to the owners; we would have got 25% of its value and as owners of the property we contended that we were entitled to all of it. [108—33]

Q. Then if yourself and Mr. Treat were only interested in the royalty and had no interest in the property itself, would it have been to your advantage to have the hoist sold or retained?

A. Sold, certainly.

Q. I hand you an instrument addressed to the Cliff Mining Company dated Valdez, January 2, 1911, and ask you if that is another protest served by yourself, Ellis and Treat as owners upon the 'Cliff Mining Company? (Handing witness paper.)

A. Yes, that is one of the several notices.

Q. Is that Ellis' signature?

A. That is Ellis' signature, Treat's signature and my own signature.

The paper is offered in evidence, marked Plaintiffs' Exhibit "F" and admitted without objection. It reads as follows:

(Testimony of Edmond Smith.)

**Plaintiffs' Exhibit "F" [Letter, January 2, 1911,
H. E. Ellis et al. to Cliff Mining Co.].**

"Cliff Mining Company,
City.

Gentlemen:

In addition to items mentioned in former statements, we, the undersigned, owners and lessors of the Cliff Mining Ground and claims, object to any tools such as picks, shovels and steel being charged against the owners except such as may have been purchased to replace those broken or worn; the latter may come under the head of repairs. We also object to any part of wharf being charged against us as owners or lessors, or deducted in whole or in part from the rents or royalties. We contend that the only articles which are chargeable against the gross output are—

'Superintendent, miners, mill men and other labor necessarily and economically employed, explosives and repairing.'

Very truly yours,

H. E. ELLIS,
EDMUND SMITH,
GEO. C. TREAT."

Valdez, Alaska, January 2, 1911.

Q. How came this protest to be made, if you can recall it at this time—exhibit "F"?

A. Well, it was in regard to charging to the owners and deducting from the royalty the improvements placed upon the property. We contended that the only thing that should be deducted from the royalty

(Testimony of Edmund Smith.)

was the pay-roll, Superintendent, etc., as provided in the lease. The Cliff Mining Company claimed that they had a right to deduct all improvements, machinery, tools, etc., from the owners and [109—34] we served several notices upon them in regard to the management of the property and the charges made against the owners. Some were oral and some were in writing.

Q. Did you ever transfer any of your interest in the property described in the complaint to any other person? A. Yes, sir.

Q. State to whom and when?

A. I sold half of my interest to Mr. Archibald some time in 1913.

Q. January 3, 1913? A. I think so.

Q. And as far as you know Mr. Archibald has half of whatever interest you have in the property?

A. Yes, I sold him half of my interest in the property.

Q. Now, along about July, 1910, was there a survey made of the property described in the complaint by anybody?

A. About that time; I can't state the date.

Q. Just state the circumstances and the conversations between yourself, Mr. Treat and Mr. Ellis in regard to it, in regard to making this survey.

At that time they were making a good many locations in that vicinity on account of the value shown in the Cliff and in order that there might be no question as to the boundaries and that the claims were properly staked, I saw Mr. Ellis and suggested

(Testimony of Edmund Smith.)

that a survey be made and if any of the stakes were down, they be replaced and the lines thoroughly marked and in that conversation he agreed with me.

Q. That is, Mr. Ellis agreed with you that that should be done?

A. Yes; that that was the proper thing to do and Mr. Storm was employed to make the survey, which also would be the basis of a survey for patents, save doing the manual part of the labor later on. [110—35]

Q. Do you know of Mr. Storm's making the survey?

A. I know about his giving me the field notes—I wasn't on the ground with him.

Q. Did you and Mr. Ellis have any conversation about that time in reference to placing amended location notices, posting them upon this property?

A. We did; the survey varied somewhat from the original locations, the descriptions were rather indefinite; I suggested making amended locations of the mining claims.

Q. Did you prepare amended locations for posting? A. I did.

Q. For posting?

A. For posting—prepared them in duplicate.

Q. Where did you get the data to prepare these amended locations from?

A. Mr. Storm's field-note book.

Q. Mr. Storm was the surveyor who made it?

A. The surveyor who made the survey.

Q. What did you do with those amended location

(Testimony of Edmund Smith.)

notices that you prepared?

A. Well, as I recollect it, they were signed in my office by all of us; I know they were signed by Mr. Treat and myself and I believe they were signed by Mr. Ellis. Mr. Ellis came in and got them and was to take them down and place them on the ground and either record them himself and we were to pay our *pro rata* portion of it or he should turn it over to the Cliff Mining Company and they could pay for recording it and charge to the royalty account.

Q. Do you know whether you made out location notices for each of the eight claims? [111—36]

A. Each of the eight claims.

A. Did you state what you did with those eight location notices after they were prepared?

A. I gave them to Mr. Ellis for posting on the ground and recording.

Q. Have you seen them since?

A. I have never seen them since—I supposed they were on the ground.

Q. Have you examined the records to see if those amended location notices were recorded?

A. I have.

Q. What was the result?

A. They were not recorded,—at least, I couldn't find them.

Q. Can you state from your memory whether or not those amended location notices defined the respective interests of the three of you in the property in controversy? A. They did.

Q. State how that was.

(Testimony of Edmund Smith.)

A. Ellis 80%, Treat 10% and my own 10%—I put that in for Ellis' protection, because otherwise if it was not so designated, we would be equal owners in the property.

Q. Did Ellis read those amended location notices?

A. He read them.

Q. Did he make any protest to them?

A. Never, never said a word about it, never spoke to me about it since; I never knew but what they were recorded until this difficulty came up.

Mr. DONOHOE.—We at this time demand of the defendant that he produce those amended location notices which were delivered to him as the witness has testified to. [112—37]

Mr. GANTY.—We have no knowledge of such location notices as have been testified to. I will put the defendant on the stand and he will deny that they were ever delivered to him.

By the COURT.—If you say you haven't got them, you can't produce them.

Q. Did you describe how your respective interests were stated in those notices?

A. I did; I stated in answer to your question that the notices themselves provided that Ellis owned 80%, Treat 10% and myself 10%.

Q. Did Ellis after reading those in your office make any objection to them whatever?

A. None whatever; he said he would put them up on the ground and have them recorded.

By the COURT.—Did you say those were signed by Mr. Treat?

(Testimony of Edmund Smith.)

A. Yes, sir, they were signed by Mr. Treat in my office and I think by Ellis; they were delivered to Ellis and I had already signed them in the office.

Q. Your best recollection is that you and Treat signed? A. Yes, sir.

Q. And Ellis signed them in your office?

A. Yes; I know that Treat and I signed them and I am quite sure that Ellis signed them in the office, although I am not sure of that—it was sometime ago and I myself dismissed it after it was done.

Q. Drifting back to that survey again—what was the cost of the Storm survey?

A. Four hundred dollars, I think.

Q. Who paid it?

A. It was paid by the Cliff Company and charged to Ellis, Treat [113—38] and myself according to our interest in the property.

Q. It was deducted from your royalty?

A. It was deducted from our royalty—our royalties.

Q. Did Ellis at that time ever make any announcement that he should pay all of that?

A. Never—there never was a question raised by Mr. Ellis in regard to the ownership of this property until since I went out to Seattle; up to the time of the commencement of this action, as far as I know, I never heard of it.

Q. Do you remember of a conflict between the property in controversy and certain claims, what is known as the Bluff Mining Co.?

(Testimony of Edmund Smith.)

A. I knew there was such a thing, I heard there was and I saw their notices of application for patent, of the Bluff Company.

Q. That came up after?

A. That came up after I went to Seattle.

Q. After you left for Seattle?

A. Yes—I wrote Mr. Ellis and advised him about it.

Q. There were certain costs incurred in that matter—did you pay any proportion of the costs?

A. The court costs and the filing, etc., were paid by the Cliff Mining Co. and charged to the respective accounts of the owners of the property. The attorney's fee, Mr. Bunnell sent me a statement of my proportionate part of it and I paid it to him—I had Lathrop do it for me and I paid Lathrop.

Q. Do you remember what Mr. Bunnell's attorney's fees were in that suit—what was the total amount of them? A. One thousand dollars.

Q. And what proportion of it did you pay?

A. I paid \$50, that was half—I had sold half of my interest to Mr. Archibald. [114—39]

Q. That was five per cent?

A. That was five per cent.

Q. I hand you a statement entitled Cliff Mining Company, Cash paid out in re Gold Bluff suit, April 1st, 1914, and ask you if that is the statement sheet of the Cliff Mining Company for the moneys paid out by them in connection with that Bluff suit.

A. Yes, that is the statement.

(Testimony of Edmund Smith.)

Q. Was the amount of money stated there deducted from the royalties? A. It was.

Q. And what proportion of that expense was deducted from the royalties coming to you?

A. Five per cent.

Mr. DONOHUE.—We offer this statement in evidence.

It is admitted without objection, marked Plaintiffs' Exhibit "G," and reads as follows:

**Plaintiff's Exhibit "G" [Statement, April 1, 1914,
Paid Out In Re Gold Bluff Suit].**

CLIFF MINING COMPANY.

Cash Paid Out In Re Gold Bluff Suit.

April 1st, 1914.

1912.

Sept. 30.	Vch. 1829.	L. W. Storm a/c survey	\$ 40.00
Nov. 4.	Vch. 1898.	L. W. Storm a/c board	7.00
Nov. 5.	Vch. 1902.	J. S. Hickey, a/c survey helper	21.25
Nov. 5.	Vch. 1902.	H. N. Carter a/c survey helper	21.25
Nov. 30.	Vch. 1952.	L. W. Storm a/c survey helper	113.00
Dec. 30.	Vch. 2003.	C. E. Bunnell a/c cer. copies, notices, etc.	32.50

1913.

Feb. 1.	Vch. 2052.	F. Nelson a/c launch fare	3.00
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(Testimony of Edmund Smith.)

Feb. 24.	Vch. 2081.	C. E. Bunnell a/c fil- ing fees, etc.....	25.40
Nov. 28.	Vch. 2539.	L. W. Storm a/c de- scriptions & map of gr.....	60.00
Nov. 28.	Vch. 2542.	W. Lee a/c witness fee	5.00
Dec. 6.	Vch. 2555.	W. Callaghan a/c launch fare for witnesses.....	6.00
Dec. 11.	Vch. 2572.	C. E. Bunnell a/c cer. copies loca. notices.....	5.00
1914.			
Jan. 12.	Vch. 2626.	C. E. Bunnell a/c bal. costs to court	1.65

\$341.05

Proportion Charged to Owners.

H. E. Ellis.....	80%	272.84
G. C. Treat.....	10%	34.11
E. Smith.....	5%	17.05
L. Archibald	5%	17.05

341.05

[115—40]

Q. Do you know who employed Mr. Bunnell to appear in this suit for Mr. Ellis and the owners of the property in controversy?

A. I know what Mr. Bunnell represented to me. I offered to prepare the papers, wrote to Mr. Ellis that I would prepare them without any costs and the next thing I heard was that Mr. Bunnell had pre-

(Testimony of Edmund Smith.)

pared the papers and told me he had been employed by Mr. Ellis.

Q. And he sent a statement of his fees?

A. He sent me a statement of his fees and I paid him my part of it, 5%.

Q. You paid \$50 of the thousand dollar charge—that is 5% of the property?

A. That is the way I figured it.

Q. You had previously sold half your interest to Mr. Archibald?

A. Yes, I notified Mr. Archibald of the payment and I understood he paid his portion, but I don't know about that of my own knowledge.

Mr. DONOHUE.—That's all.

Cross-examination by Mr. GANTY.

Q. I am going back to the beginning of this story and referring to your evidence regarding the smelter account for this ore shipped by you under the agreement evidenced by Plaintiffs' Exhibit "A"—you said that that accounting was destroyed, I believe, by fire.

A. No, I didn't state that. I left it in the offices that I occupied before I left and I find upon my return here and I have other evidence that the building was destroyed.

Q. Did you have any other papers connected with this case along with that instrument? [116—41]

A. The articles of incorporation were left somewhere in the office of the Mystic Gold Mining Company, and other papers.

(Testimony of Edmund Smith.)

Q. That is the articles which were drawn up pursuant to your agreement to incorporate?

A. Yes, sir.

Q. You left all those papers in what was your office at that time? A. Yes, sir.

Q. In charge of Mr. Bunnell?

A. Well, I simply left them there; I didn't want to pay freight on anything unless I thought it could be of some use in the future.

Q. To the best of your recollection \$36 or so was about all the net returns on that ore?

A. That was about all the net returns after deducting what the smelter deducted and as I remember the gross returns, the gross values, was twenty-six dollars and some cents per ton, coming to, as I recall it, about \$106, which was the total extraction allowed for the ore.

Q. What boat was that ore shipped on, do you remember? A. I couldn't say, no.

Q. The claim from which this ore was taken and which is described in Plaintiffs' Exhibit "A," in what we term a contract and mortgage—I presume you would consider it such also?

A. I simply drew up a contract according to our agreement at that time.

Q. That contract provided, did it not, that it should be construed as a mortgage?

A. I think it does, yes, sir, but I don't want to testify as to its legal effect.

Q. At any rate it was so construed by all the parties thereto? [117—42]

(Testimony of Edmund Smith.)

A. I don't know that we placed a construction upon it. We made a contract with Mr. Ellis, gave him this money to develop this property and we tried to prepare a contract to protect both ourselves and Mr. Ellis.

Q. You prepared that you said? A. Yes, sir.

Q. Now, I will read from this exhibit "A" as follows:

"This contract is deemed and considered by the parties hereto as a mortgage on said mining claim, with full power of sale in the manner provided by law for the sale of real estate under real mortgage and for that purpose said party of the first part gives, grants, sells and assigns to the parties of the second part said mining claim, but as security only for said five hundred dollars and upon payment of said sum of five hundred dollars by the party of the first part at any time within six months from date hereof and the delivery to the parties of the second part of one-quarter of smelter returns from said shipment, less freight and smelter charges, this agreement to be null and void, otherwise to remain in full force and effect."

Q. How did you construe that at the time?

A. Well, I simply construed it as an instrument drawn up for the protection of Mr. Treat and myself for the advancement of this money.

Q. Is it not a fact that you construed it as a mortgage upon this property?

(Testimony of Edmund Smith.)

A. It says so here and apparently we all construed it as that, because we say so, but I am not testifying as to the legal effect of the paper.

Q. But you considered it as a mortgage at the time? A. Yes, sir. [118—43]

Q. And what was the general purport of your conversations then with Mr. Ellis, after you had received these smelter returns and before you incorporated this company or signed this agreement to incorporate the company?

A. It covered probably a vast field—Mr. Treat and I had invested this money or advanced this money; we were interested to that extent—we were interested in the development of this property in particular and the country generally and we discussed many ways and means for the development of this property and opening it up.

Q. Well, your interest in this property is shown by that agreement, exhibit “A,” is it not?

A. Up to the time of the agreement, that was made in the following year, 1908.

Q. Then the relative status of the ownership, as far as yourself and Treat are concerned, in and to that property, remained unchanged until the contract of July 9, 1908, was entered into?

A. That is the contract preparing for the incorporating?

Q. Yes.

A. Yes, as far as I can recall—I don’t know of anything that changed it in any way.

(Testimony of Edmund Smith.)

Q. You stated that you drew up some articles of incorporation under that agreement to incorporate.

A. Yes, sir, I think that is admitted in the answer.

Q. Who drew these articles up?

A. I think I did, I don't know; I think Mr. Bunnell was in the office with me but I am not quite sure I drew the articles up.

Q. If not drawn by you they were drawn under your supervision?

A. They were drawn in the office and I think they were drawn by me—that proposition of Mr. Ellis and the other papers for thoroughly organizing a corporation.

Q. What date were they drawn?

Mr. DONOHUE.—If the defendant has in his possession a copy of [119—44-46] those articles of incorporation, I think it is but fair to present them to the witness for examination. I understand he has certain copies.

Mr. GANTY.—You have been given to understand no such thing. Mr. Smith testified that he left them in the office with Mr. Bunnell. We have got one and we are going to produce it.

Q. What was the name of the proposed incorporation?

Mr. DONOHUE.—We object to that without first showing the witness the articles themselves—and the articles themselves would be the best evidence.

By the COURT.—Yes, the statute says, if the witness is testifying regarding a paper you have, he must be shown the paper.

(Testimony of Edmund Smith.)

Q. I will ask you if those are the articles of incorporation you testify as being drawn up by you or under your care? (Handing witness paper.)

A. Yes, I should say they were, that is my stationery and that is the name of the company as I remember it.

Q. State the name of the proposed incorporation that was agreed upon.

A. Well, that is in the contract of July 9, 1908, which is not before me now.

Q. In whose charge were those papers left after being signed?

A. Well, I don't know, Mr. Ellis has this; I don't know whether it was left in my charge or where they were left; I suppose they were left in the office.

Q. Your memory isn't perfectly clear on every transaction that took place at the time of signing these articles?

A. My recollection is clear on almost everything in connection with it. Of course, I don't pretend to remember every word that was used by the parties during this transaction; I know that all preliminary matters were cleaned up and terminated and embodied in the contract of July 9, 1908. I notice these articles have been mutilated by somebody by a pen having been drawn through the names of the signers; I don't know who did that. [120—47]

Q. You don't know anything about that?

A. I don't know anything about that.

Q. You are not willing to testify, then, as to

(Testimony of Edmund Smith.)

whether or not at the time these articles were signed, they were left in your office?

A. No, I am not. All of the papers that I had in the office except matters that I thought might be of interest to me below or some personal matter that was still pending, I left in the office, I can't name the papers—there were probably a half dray load of letter files and other files and papers.

Q. I hand you herewith another copy of these articles of incorporation, which you will notice has the signatures torn from the bottom of it, and I will ask if you identify that as being a copy of these articles of incorporation.

A. Well, I should say it was a copy of it; part of it seems to be detached and been removed and thrown away—the latter part of one page is torn off; I should say that that is on my stationery—the name is the same.

Q. I hand you another copy and ask you if that also is a copy of those articles.

A. So far as I can see it is the same as the first one submitted to me—instead of the names being torn off, a pen has been drawn through the names of the parties.

Q. Here is another paper, and I ask you what that is. (Handing witness paper.)

A. Without comparing it and checking it up, I should say it was another copy of the Articles of Incorporation.

Q. Is that your signature at the bottom?

(Testimony of Edmund Smith.)

A. That is my signature at the bottom.

Q. Do you know the signature of Mr. Treat?

A. I think I do.

Q. Is that his signature? A. Yes, sir.

Q. Is that Mr. Ellis' signature? [121—48]

A. That is Mr. Ellis' signature to the best of my knowledge.

Q. To the best of your knowledge, these signatures are the signatures of these parties, whose names appear on these Articles of Incorporation?

A. Yes, I testify that they are.

Q. Then when you say you left these articles in Mr. Bunnell's office you are mistaken?

A. No, I am not mistaken; I don't know where you got them; I say all the papers I didn't want to take with me and didn't need, I left in the office.

Q. You do not wish to be understood as saying that these papers were destroyed, that any papers were destroyed that belonged to this corporation, by agreement, in Mr. Bunnell's office?

A. I left everything and the last I knew of them, to the best of my recollection, they were in the office, —I don't know where they were and I don't know who took them out.

Q. When did you leave them there?

A. I don't remember seeing those Articles of Incorporation until some time after their execution.

Q. How long after their execution?

A. Probably the following year, at intervals.

Q. Did you see them a year after their execution?

(Testimony of Edmund Smith.)

A. I can't say as to that; I don't remember, haven't any distinct recollection of having seen them at all—I knew they were executed and prepared.

Q. You don't remember seeing them at all after they were executed?

A. Not any specific recollection of it, no—I can't name any time I saw them or how they were filed away, or anything else. I simply know that all the papers were left in Mr. Bunnell's office except a few I took with me to Seattle.

Q. And you don't know how this one became mutilated?

A. I don't know how any of them became mutilated. [122—49—50]

Mr. GANTY.—I ask that these be marked for the purposes of identification. (The four copies of Articles of Incorporation of the Mystic Gold Mining Company are marked for identification, Defendant's Exhibits 1, 2 and 3, and four.)

Recess to 2.

These four copies of Articles of Incorporation were later in the course of the trial admitted in evidence as Defendant's Exhibits 1, 2, 3, and 4. They are duplicates and read as follows:

Defendant's Exhibits 1, 2, 3 and 4.

**ARTICLES OF INCORPORATION
of the**

MYSTIC GOLD MINING COMPANY.

(The copies of these Articles are omitted, for the reason that the original exhibits are forwarded with

(Testimony of Edmund Smith.)

the record to the Appellate Court, for the purposes of physical examination.)

Tuesday, October 5, 1915.

Afternoon Session.

Continuation of cross-examination of EDMUND SMITH by Mr. GANTY.

Q. I understood you to say that among the papers which you thought you had left in Mr. Bunnell's office were these Articles of Incorporation, which are in evidence here as defendant's exhibits and also an agreement from Mr. Ellis to deed his mining property in controversy to this corporation.

A. Not an agreement—a proposition, as I remember it.

Q. Do you remember what proposition?

A. No, I don't remember the details of it. Have you got it?

Q. You don't remember it was an agreement, but a proposition?

A. That is as I remember it—that was the usual form.

Q. I ask you if that is the proposition or agreement or whatever it is. (Handing witness paper.)

A. I presume that it is; that is what I took it to be.
[123—51—53]

Q. It was drawn up by you, was it?

A. I presume so; it is on my stationery.

Q. Is this another copy? (Handing witness paper)

A. This seems to be—I haven't compared them; it

(Testimony of Edmund Smith.)

seems to be a copy of the other; I haven't checked them up.

Q. And that also? (Handing witness paper.)

A. That seems also to be another copy; I say I haven't checked them up.

Q. You acknowledge that to be Mr. Ellis' signature? You know his signature?

A. I know his signature; yes, that is his signature to the best of my knowledge.

(The three documents last referred to are admitted in evidence, without objection, and marked Defendant's Exhibits 5, 6, and 7.)

Mr. DONOHUE.—They are all duplicates?

Mr. GANTY.—They are all duplicates; yes, sir.

These exhibits #5, 6 and 7, which are duplicates, read as follows:

Defendant's Exhibits Nos, 5, 6 and 7 [Proposition of H. E. Ellis, Dated July 21, 1908, to Mystic Gold Mining Co., Re Incorporation].

“Valdez, Alaska, July 21, 1908.

To the Mystic Gold Mining Company, a corporation:

For and in consideration of the issuance to me of all of the capital stock of said corporation, to wit, two hundred thousand (200,000) shares, I will convey by good and sufficient deed of conveyance those certain eight (8) lode mining claims situated on the northerly side of Valdez Bay, known as the Mystic Group.

I will also donate to said corporation 20 per cent of said stock, or forty thousand (40,000) shares, said shares to be sold by said corporation, or such thereof

(Testimony of Edmund Smith.)

as may be necessary to raise money sufficient to develop said mining property and install reduction plant thereon; said forty thousand shares to be known as treasury stock and to be used as the board of directors may deem for the best interests of said corporation.

H. E. ELLIS,

Q. You, think, stated that you have no clear recollection as to what was done with those documents after they were signed?

A. No, I have not. I was drawing a good many papers, I have drawn a good many papers since 1907 and I haven't a clear recollection. I suppose they were left in the office with other papers that I left there when I moved away from the city. I know they were not used as I said. [124—54]

Q. And that is all you remember of it at this time?

A. That is all I remember of it. I know as a matter of fact, as far as those are concerned, it was all settled up when the Crane option was given everything was cleaned up between us.

Q. At the time the Crane option was given, that is Plaintiff's Exhibit "B"?

A. I don't know the number of the exhibit; I think it is in evidence here.

Q. That is the instrument that was entered into (handing witness paper), and you say at that time all these things were settled?

A. Yes, that is the date; that is the time that everything between us was settled up as I testified this morning.

(Testimony of Edmund Smith.)

By the COURT.—What is the date of that?

Mr. GANTY.—It is dated the 5th day of June, 1909. It is headed Memorandum of Option Agreement—it is the Crane agreement. This was not introduced in the pleadings and it is a point I wish to make clear to the Court, the very point testified to by this plaintiff, that when this instrument was entered into, the respective rights to this property had been settled, that is exactly our contention.

The WITNESS.—I didn't state that.

Q. In the agreement to incorporate, it was part of your obligation in that agreement that yourself and Mr. Treat were to sell the treasury stock, was it not?

Mr. DONOHUE.—We object to that question on the ground that the instrument speaks for itself.

By the COURT.—Yes, it says so; it has been introduced and is part of the evidence already.

Q. Did you secure any subscriptions at all?

A. No, sir, none whatever. [125—55]

Q. How long after the execution of this agreement to sell this stock was it before you became aware of the difficulties you would experience in selling this stock?

A. I don't know; we experienced difficulties in the beginning. As I stated before, the town was in a pretty bad shape—it was the year after the Reynolds break-up here in the town, and we experienced difficulties right along until we met Mr. Crane, sufficient difficulties so we couldn't place the stock.

Q. Was the financial condition of the town the same as just testified to at the time that this agree-

(Testimony of Edmund Smith.)

ment was entered into to sell the stock?

Mr. DONOHUE.—We object to the latter part of that question, to sell the stock. We contend that the contract of July 9, 1908, provided that Treat and Smith were to devote to the enterprise their time and attention in selling the stock—there was no agreement to sell the stock.

Objection overruled; plaintiffs allowed an exception.

A. I presume it was— there was a little change occasionally, but practically the same.

Q. Did you notify Mr. Ellis of the difficulties you experienced in selling this treasury stock?

A. Yes, we had several conversations with him.

Q. About what time, did you so inform him?

A. It was discussed at various times, when I met Mr. Ellis on the streets, and he was in the office a few times when the matter was discussed and Mr. Ellis understood the condition of the town as well as I did—I think he did, at least.

Q. About what time was it agreed that you should hold this contract to incorporate in abeyance?

A. I don't understand that there was any agreement to hold it in abeyance at all. [126—56]

Q. At the time you entered into this contract, you did not anticipate any difficulty in selling the treasury stock? A. Which contract?

Q. The contract to incorporate and sell the stock?

A. The contract of July 9, 1908?

Q. Yes, the contract of July, 1908?

A. I certainly did not anticipate to get out on the

(Testimony of Edmund Smith.)

street and sell to the first man we met. We did expect to have difficulty in selling it, because of the condition the town was in and the unknown character of the district at that time. There had been no producing mines or discoveries of any value that I know of in that section.

Q. Did you notify Mr. Ellis at that time that you expected some difficulty in selling this stock? Did you so inform him?

A. I don't know that I said that—I don't know whether I did or not.

Q. At the time that the contract with Crane was entered into, did you own any further interest in this property, except such as you acquired under the incorporation agreement?

A. Well, at the time the contract was signed by Mr. Crane and executed, why we claimed that we did.

Q. What was that interest?

A. That was a 20% interest, ten per cent each to Mr. Treat and myself.

We acquired it partially through the money we had advanced for the development of the property and partly through the contract of 1908, the agreement to incorporate, and then by specific agreement with Mr. Ellis just prior to the execution of the Crane contract, as I testified this morning.

Q. If I understand you right, then, you acquired a further interest than the one you held under the contract to incorporate on the day that the lease to Crane was made?

A. I didn't say we acquired a different interest; it

(Testimony of Edmund Smith.)

was simply [127—57—58] changed; the form of our interest was changed, as I stated this morning. We were to have —it would be about 25% of the stock in the incorporation, so far as Mr. Ellis' and our interests were concerned, because 20% went into the treasury; we were to have 20%, Ellis 80% and 20% went into the treasury; that was the contract. Now, before entering into the contract with Mr. Crane, Ellis asked us what interest we expected in the property at that time. As I said this morning, we told him we expected 20% interest in it as provided for in the contract of July, 1908. The only change was, changing it to an interest in the specific property as distinguished from an interest in the stock.

Q. It is a fact, that at the time this lease to Crane, the agreement with Crane, was entered into, that yourself and Treat did jointly claim a one-fifth interest in this property? A. Yes, sir.

Q. And that interest you claimed for the reasons you have just stated?

A. Yes, sir, for the reasons stated, the money we put into it and the contracts, etc.

Q. Did you ever acquire any further interest after this lease to Crane was entered into?

A. No, not to my knowledge.

Q. Did Mr. Treat acquire any, to your knowledge?

A. I don't know what Treat acquired.

Q. You have acted as Mr. Treat's attorney, subsequently?

A. In several things, yes, but Mr. Treat acted for

(Testimony of Edmund Smith.)

himself in this matter, Ellis for himself and I for myself.

Q. You and Mr. Treat were acting jointly during this period?

A. I had a power of attorney for quite a number of years from Mr. Treat, a limited power of attorney, and he had one from me,—properties we were interested in jointly. [128—59—60]

Q. And this was one of them?

A. I don't know, I don't know what interest you refer to—I don't know what power of attorney you refer to.

Q. I am asking you whether you acted as attorney or attorney in fact for him.

A. I don't know whether I did.

Q. You don't remember?

A. I don't remember, no; as I stated to you, I held his power of attorney at some time, but I don't know just when it was or what it referred to.

Q. I hand you a paper and ask you if that is your signature.

A. I think so; yes, that is my signature and the signature down below is mine—George C. Treat by E. Smith, attorney in fact.

Q. You will admit at this time then that you were acting as his attorney in fact in the matters connected with this lease?

A. I admit I was acting in the matter referred to in that correspondence—I don't know what it is.

Mr. GANTY.—We offer this paper in evidence.

Mr. DONOHOE.—This is Mr. Ellis' signature too, is it?

(Testimony of Edmund Smith.)

A. Yes, that is Mr. Ellis' signature, that is, to the best of my knowledge it is.

The paper is admitted without objection, marked Defendant's Exhibit #8 and reads as follows:

Defendant's Exhibit No. 8 [Letter, December 12, 1911, A. E. Ellis et al. to Cliff Mining Co.].

“Valdez, Alaska, Dec. 12, 1911.

Cliff Mining Company,

Gentlemen: We enclose you herewith objection to certain items charged against the owners and lessors of the property, and also a claim for the tailings which were allowed to go to waste during the first year's operation. There is a large number of items on the various statements, beginning with statement dated July 1st, 1910, covering period from August 1st, 1909, such as supplies, sundries, and many that are not so designated, that we believe are not chargeable in computing the royalties.

We would request that your Board of Directors appoint one [129—61] of your number, we would suggest either Mr. Kreamer or Mr. J. C. Martin, to meet with the undersigned, with the vouchers of the Company and check over these various items, and compare same with vouchers, and if correct and proper items, we would waive the same, and if we believe they are not proper charges, we would file specific statement claiming the same, which we are not able to do from the statements furnished us.

It is our hope and desire to adjust any differences that may now, or hereafter exist between the Company and ourselves, and we will continue as in the

(Testimony of Edmund Smith.)

past, to even waive matters to which we believe we are legally and justly entitled of small value, for the sake of harmony, so long as the Company will meet us in the same spirit. We believe that with either Mr. Kreamer or Mr. Martin by comparing the statements, with the vouchers covering the same, we can readily ascertain each item and how the same should be charged.

Hoping that this matter will be received and considered in the same spirit in which it is made, and that we may get together and amicably adjust these differences, we are

Very truly yours,

A. E. ELLIS,

EDMUND SMITH,

GEO. C. TREAT,

By E. SMITH,

Attorney in Fact."

Q. When did you meet Mr. Crane for the first time?

A. It was a short time, a day or so, a few days, before the option was given.

Q. Who introduced you to Mr. Crane?

A. I can't say who introduced him to me—my recollection is that it was Mr. Treat, but I am not certain.

Q. You stated in your direct examination that you tried to get Mr. Crane, who represented that he owned a stamp-mill, to take up this treasury stock?

A. Yes, sir.

Q. You took him to see the property?

(Testimony of Edmund Smith.)

A. He was taken down there—I didn't go with him.

Q. He went with Treat and Ellis?

A. Yes, and maybe there were others, I don't know just who went down—I know the arrangements were made for him to go down with the parties. [130—62]

Q. Then you presumed at that time, at least, that this incorporation agreement between yourself and Mr. Treat and Mr. Ellis was still alive?

A. Why, I presume it held, as I told you before, and the reasons for it.

Q. Then, as a matter of fact, you yourself did not procure this offer to lease from Mr. Crane?

A. I don't know who procured it—I think it came voluntarily from Mr. Crane. I don't know whether Mr. Crane *forst* told me what his offer was or whether it was communicated to me by Mr. Ellis or Mr. Treat.

Q. Do you remember its being stated by any of the parties when you met, when Mr. Crane was present, as to who first notified him of this property and told him about it?

A. Yes, I was so informed; I was informed it was through, I think, Mr. Bob Coles; I think Mr. Bob Coles took him to Mr. Treat, as I understood it; Coles was working for the company that Mr. Crane represented—it was the Haines Company and some people in Seattle, I think, had bought the stamp mill to operate somewhere on the glacier, and the matter come up and Mr. Coles, as I understood at the time, took Mr. Crane and in-

(Testimony of Edmund Smith.)

roduced him to Mr. Treat and told him about this property.

Q. Did you represent yourself to Mr. Crane at that time as being a one-fifth owner of the property, yourself and Treat together?

A. I represented to him the conditions as they existed at that time, the status of the proposition.

Q. And Mr. Ellis came into your office and asked what interest each of the parties expected in the property under this option to Crane, you said—I will read your answer from your direct examination “Mr. Ellis came into the office from his meeting with Crane and says, ‘What interest do you expect in this property if we carry out this lease?’ I told him we expected 20% as provided [131—63] for in the contract and Mr. Ellis says, ‘Well, this will save you some work and some expense.’” Is that about the facts?

A. Something along that line; that is the purport of it.

Q. You are perfectly clear at this time that you claimed a 20% interest in the property for yourself and Treat? A. Yes, sir.

Q. You were authorized to speak for Mr. Treat at that time? A. Mr. Treat was present at that time.

Q. But you were speaking for him?

A. We were discussing it together; I think I made a statement—we all discussed it; and Treat made a statement in regard to it too. We told him that we considered that our money had developed and shown the only value that was known in the property and

(Testimony of Edmund Smith.)

we considered it in the nature of a grubstake contract that we had no money to loan; that we took our chances on the mining properties in the hope of making some money out of it.

Q. This conversation took place prior to the signing of the lease to Crane, prior to the signing of the option to Crane?

A. Yes; Crane was going away that night and this was along in the evening, some time after seven o'clock; I don't know what hour it was.

Q. How did you come to fix the percentage you were to receive as royalty at 15%.

A. The same as we would have come to it if we had said 16—we went into the back room and it was uncertain whether Ellis would go ahead with the proposition with Crane; we didn't know—he hadn't said he would or would not and we decided to make some concession—it might have been any other concession.

Q. It might have been any other interest if you could have got it?

A. It might have been anything that we decided upon at that time; we just knocked off or gave Mr. Ellis 5% of what we thought we were entitled to.
[132—64]

Q. In other words, you simply agreed that that was the biggest percentage that Ellis would allow you?

A. I don't know that we considered that. I was uncertain whether the contract would go through and we were anxious to get the property developed, not

(Testimony of Edmund Smith.)

only for our own account, but for the benefit of the community. If there were valuable mines here we wanted to know it and have it developed and we made that concession for those reasons.

Q. You are sure those are the reasons.

A. Yes, those are the reasons.

Q. Now, reading here from the complaint in this case on page 7, paragraph 7:

“That at the time of the negotiations which resulted in the contract described as Plaintiffs’ Exhibit ‘B,’ the said defendant Ellis insisted on a higher rent or royalty than that named in the contract, and the said Crane refused to agree on a higher royalty, and thereupon plaintiffs Treat and Smith, believing the lease to be advantageous, agreed that the defendant should have eighty-five per cent of said royalty instead of eighty per cent thereof, to which percentage he was entitled at that time as the owner of eighty per cent of said mining claims, in order to induce defendant to enter into said lease.”

How do you explain that?

A. Well, that is the version the attorneys got from what information they got from Mr. Treat, I presume.

Q. And it is not the correct version?

A. I have given you the statement and as to their application, that is a matter for the Court—I don’t care to testify as to the effect of any difference between them.

Q. It is a fact, Mr. Smith, that you drew up the

(Testimony of Edmund Smith.)

first agreement between yourself and Mr. Ellis and Mr. Treat regarding the Mystic claim and the \$500 advance?

A. Yes, I think I drew all those papers.

Q. You drew all the papers—you drew the contract to incorporate, and you drew the incorporation papers?

A. Yes, sir, they were drawn in my office and I presume I drew them. [133—65-69-70] My recollection is that I dictated the option myself.

Q. The option to Crane?

A. The option to Crane.

Q. And the lease to Millard?

A. Yes, and the lease to Millard.

Q. And all these various notices sent out?

A. I don't know how many notices there may have been sent to the Cliff when I was out, but all notices my name appears on, I probably dictated, but it was after a conference with Mr. Ellis and Mr. Treat and they were in accord with what we had decided to do.

Q. Did you send any notices to the Cliff Mining Company while you were out?

A. Yes, after I moved to Seattle I sent a notice to them; I moved to Seattle and sent a copy of it to Ellis and wrote Ellis at the same time.

Q. And sent one to Treat at the same time?

A. I don't know whether I did or not; I imagine I sent him copies of the letters also, but I am not certain as to that, but I know I wrote Ellis in regard to it.

Q. Did you act as attorney for the Cliff mine?

(Testimony of Edmund Smith.)

A. In a few matters; yes.

Q. When did you act so?

A. I can't tell when,—there were several little matters; I prepared some contracts for them.

Q. I mean relative to the Cliff?

A. For the Cliff Mining Company; I prepared contracts for them—I think I prepared some contracts for driving tunnels and I think I prepared some contracts for piling and it is my recollection that I prepared an assignment of this lease from Millard to the Cliff Mining Company. [134—71-73]

Q. Were you regularly retained by them?

A. No, I was not; when they had any work they cared to submit to me, I did the best I knew how and charged them for that specific work.

Q. At the time this agreement to incorporate was entered into, did you—I think you testified, however, that you did not—hand Mr. Ellis any written release or anything of that kind?

A. Except that contract itself; we regarded that as a release of everything—I had nothing to release. This other contract, as I recall it, was not of record, this contract of 1907.

Q. Did you have a copy of it in your possession at that time?

A. I presume I did; I have one now and presume I had one at that time; every paper that was ever prepared, Ellis was delivered a copy, and Treat a copy and I retained a copy.

Q. You had a copy of the contract and mortgage at the time of the incorporation?

(Testimony of Edmund Smith.)

A. I presume so—I had it at the time it was drawn and presume I had it in my possession at that time.

Q. You testified concerning some amended locations; you stated, I believe, that yourself and Treat signed those location notices but that you were not quite sure whether Mr. Ellis signed them or not?

A. I was not positive whether Ellis signed them or not—I know Treat signed them and I delivered them to Ellis.

Q. Did you consider it essential that the original signatures of the parties should be on these location notices?

A. I don't know that I considered that matter at all, but each party was considered in it. As a legal question, I don't know whether it was essential or not, I wouldn't testify as to the legal requirements of the location of mining claims—I will tell you what we did.

Q. What became of those location notices?

A. I gave them to Mr. H. E. Ellis. [135—74]

Q. You prepared them?

A. I prepared them at the suggestion of Mr. Storm, the surveyor, and I took it up then with Mr. Ellis and Mr. Treat and they said, "All right; go ahead," and I prepared them, and used his field-notes for the description of each claim, that is, Mr. Storm's field-notes.

Q. (By the COURT.) Was that after the Cliff was running?

(Testimony of Edmund Smith.)

A. Yes, that was about—well, I can't say—it was after it was in operation; I think it was about the time of the location of the Sealey-Davis property, if I remember correctly.

Q. When did you first hear about this adverse suit and Mr. Bunnell having been retained to draw the papers up?

A. I heard that in Seattle. I had the papers sent to me from here when I went to Seattle and I noticed the application for patent of the Gold Bluff Company, and I wrote to the Cliff Mining Company demanding of them that they defend that suit under their lease, which they contracted to do, that is, they contracted to prevent any locations or any adverse claims being asserted during the life of the lease. I also wrote Mr. Ellis in regard to the matter and told him—well, I wrote him in regard to the matter and I did offer to prepare the adverse claim and complaint and forward them to him.

Q. Did you not advise, as your opinion, that the Cliff Mining Company under this lease should stand the expense of this adverse suit?

A. My contention was that the Cliff Mining Company should defend that suit and pay the expenses.

Q. Did you notify Mr. Ellis to that effect?

A. Not in that particular matter, except I did in this particular letter—I don't remember what I said in that letter, except my offer to do this work.

[136—75—78]

Witness excused.

[Testimony of George C. Treat, on His Own Behalf.]

GEORGE C. TREAT, one of the plaintiffs, called and sworn as witness in his own behalf, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. Your name is George C. Treat and you reside in the town of Valdez? A. Yes, sir.

Q. Did you reside here in 1905? A. Yes, sir.

Q. You are acquainted with Edmund Smith?

A. I am.

Q. And with H. E. Ellis? A. Yes, sir.

Q. And the Cliff Mining Company? A. Yes, sir.

Q. You are familiar with the mining claims in controversy in this action? A. Yes, sir.

Q. How long have you known Mr. Ellis?

A. I think he came to the country the year after I did, which would be—I came in 1907, I mean 1897—I think he came in '98—1898.

Q. You were pretty well acquainted with him from that time on, until the present time?

A. Fairly well.

Q. Did you some time in December, 1905, have any business transactions with Mr. Ellis in regard to money matters?

A. Yes, sir, I loaned him \$200 in December, 1905.

Q. December 15, 1905? A. Yes, sir.

Q. Did he give you any security or any evidence of that indebtedness? **[137—79]**

A. Yes, he gave me a mortgage on a little piece of

(Testimony of George C. Treat.)

property on the reservation, next to a house owned by Rudolph.

Q. Did you at any time ask Mr. Ellis to repay you that amount of money?

A. I did; it was probably a year after as near as I remember. I met him on the street one day and told him I was a little short myself and if he could return the \$200, the loan I made him some time before, it would help me out and he said he could in a few days.

Q. Did he repay it to you within a few days?

A. No, he did not.

Q. Now, at the time you made this loan in December, 1905, did you demand security from Mr. Ellis? A. No.

Q. How come you to have the security you have mentioned?

A. Well, I met him in the bowling-alley one night, I think it was, and there were two or three different ones there I loaned money to that night and I went to him and asked him if a little money would help him or how he was fixed, or something of that kind, and he said he was pretty hard up and money would help him a good deal, and I asked him how much he wanted and he said \$200 would help him, he wanted to do some work over in the gulch across the bay here and he hadn't the money to get his outfit and I gave him a check for \$200. I didn't ask for any security or anything of the kind. My impression is he gave me the mortgage the next day, if I recollect it right.

(Testimony of George C. Treat.)

Q. He said he wanted to do some work in the gulch? A. Yes, sir.

Q. That had nothing to do with the property in controversy in this action?

A. No, it was long prior to that. [138—80]

Q. What gulch did he mean, by the gulch?

A. Solomon Gulch, I think.

Q. That is on the opposite side of the bay?

A. Yes, sir.

Q. I hand you an instrument dated the 15th of December, 1905, which is headed mortgage, and ask you if that is the mortgage he gave you. A. Yes, sir.

Mr. DONOHUE.—We offer this in evidence.

(The mortgage is admitted in evidence, without objection, marked Plaintiffs' Exhibit "H," and reads as follows:)

Plaintiff's Exhibit "H."

(It is stipulated by counsel for the parties respectively that in lieu of Plaintiffs' Exhibit "H" the following statement of facts may be substituted and incorporated in the bill of exceptions:

First. That said exhibit "H" was a mortgage given to secure the payment of \$200.00 drawn in the usual form, covering a lot and frame building situated in the town of Valdez, Alaska, owned by H. E. Ellis, which said mortgage was duly recorded Nov. 12, 1906.

Second. That in said mortgage Geo. C. Treat was named as mortgagee and H. E. Ellis as mortgagor.)

Q. Do you now recall any negotiations you had

(Testimony of George C. Treat.)

with Mr. Ellis on or about the 15th day of May, 1907?

A. Yes, at the time we advanced him the \$500.

Q. Just state the circumstances under which you came to advance him this \$500.

A. He came up to my house early one morning and I think he showed me a piece of rock, rich rock; he wanted to get out some ore, as I remember it, to ship, to test, a smelter test and wanted to borrow \$500. I told him that I knew a party down town that [139—81—83] I thought might go in and if he would take half of it, I would go in with him, it was too much for me to handle alone. I had Mr. Smith in mind and I went down to see him and he agreed to go in with me and we went up and looked at some rock that Mr. Ellis had in his house and afterwards, I think, I went back to his office, Smith's office, and advanced the money there—I gave a check for \$250.

Q. At the time you advanced that money you entered into the contract dated the 15th day of May, 1907, which is Plaintiff's Exhibit "A" in this suit?

A. Yes, sir.

Q. Now, pursuant to the terms of that contract, Plaintiff's Exhibit "A," did Mr. Ellis mine any ore from the property that is now in controversy?

A. At that time?

Q. Shortly after that.

A. Well, this shipment was made; I don't know how much ore he had in the cabin—my recollection is there was about five tons shipped out.

(Testimony of George C. Treat.)

Q. Now, between the 15th day of May, 1907, and the 9th day of July, 1908, do you know of Ellis doing any considerable amount of development work on the property in controversy? A. No.

Q. Did you visit the property during that time, the mining claims? A. I don't think I did.

Q. On the 9th day of July, 1908, you made another contract with the defendant Ellis, did you?

A. Yes, sir.

Q. You and Smith on one side and Ellis on the other? A. Yes, sir. [140—84]

Q. Under the terms of that contract there was a corporation to be formed—Do you know of your own knowledge at this time how far the formation of that corporation had progressed?

A. I know the corporation papers had been drawn up.

Q. You signed them? A. Yes, sir.

Q. Do you remember Mr. Ellis signing them?

A. Yes, he signed them.

Q. He signed them—and Smith?

A. And Smith.

Q. What efforts, if any, did you and Mr. Smith make, after the execution of the contract on the 9th day of July, 1908, what efforts did you make to sell stock in this proposed corporation, treasury stock?

A. Well, we did what we could. The money market at that time wasn't very flush here, there wasn't very much money in circulation, but we did what we could and we got Mr. Hubbard interested, Charles G.

(Testimony of George C. Treat.)

Hubbard, took him down there to see it and tried to get him to take an option, and he took an option on it, a sixty-day option, something like that, but he failed to do anything. We also got a man by the name of Mills and took him down there. My recollection of that is that he wanted a leasing proposition and that wasn't acceptable to Mr. Ellis.

Q. Did you go down to the property with Mr. Mills and Mr. Ellis?

A. I think I did—I am sure I did.

Q. Do you remember any conversation had or any statements made by Mr. Ellis after the party reached the property as to who were entitled to inspect the property? A. Yes.

Q. State what that conversation was. [141—85]

A. At that time there was a narrow trail on the Cliff there, it wasn't over a foot wide—I don't know that it was that wide, and a road running along the side, and we got about halfway up and Ellis was in the lead, and he stopped and said, "What business has this man got up here?"

Q. Whom was he referring to?

A. I think it was to the man that ran the boat, that is my recollection of it. He says, "He hasn't got any business here; I don't want to go on anybody else's property unless I have a right there or an interest there; I don't care to go on it, with Treat and Smith it is all right, they have an interest here and they can go along, but I don't want someone outside." Mr. Mills was with us then, he was the one

(Testimony of George C. Treat.)

we were taking down, and this other man went back and we went on up to the tunnel, a short tunnel.

Q. Did anything come of the Mills negotiations?

A. No, there was nothing came of that.

Q. Who next, if anyone, did you and Mr. Smith or either of you interest in the property?

A. The next was Mr. Crane.

Q. Just state how you came to meet Mr. Crane and get him interested in this property.

A. Bob Coles came into my cabin one night and said he had met a man named Crane, who had come up here to investigate this man working this little property out on the glacier, Mr. Haines, and found he had spent six or seven thousand dollars out there and there wasn't anything there, he didn't get anything out of it and he says, "I have been talking to him about the Cliff, but he wasn't very much interested"—it wasn't the Cliff then, it was the Ellis property, he said—and he said, "But you had better see him and have a talk with him," and I said, "I will go down; do you know him?" And he says, "Yes, I have been talking to him [142—86] quite a while," and I came down with Bob Coles and he introduced me to Crane and I told him what I knew about the Ellis property, and he says, "Would there be any way of making a deal on it?" I said, "Mr. Ellis is the big one in it and he would be the one to see," and I said, "As far as I am concerned, I would be very glad to do anything that Mr. Smith would do." He said, "Where can I find Mr. Ellis?" and I said, "I can find him," and my recollection is I went

(Testimony of George C. Treat.)

out to Ellis' house or got him, at all events I found him and brought them together and introduced him to Crane.

Q. And you left them then?

A. Yes, I left them then.

Q. On the night of the 5th day of June, 1909, or that afternoon, did you have any talk with Mr. Ellis or with Mr. Crane as to a meeting you were to have that evening?

A. Yes; my recollection is that they were to have a meeting at 4 o'clock, but for some reason they didn't meet, and there was another one at seven o'clock. Mr. Crane had used up several days and he said unless he could do something with Ellis, he was going out on the boat that night,—in fact, he was going anyway. I stepped into the Seattle Hotel and met him and he said Ellis had not been there.

Q. When was this?

A. It was a little after seven the night they went out.

Q. Did you search for Ellis—state what you did.

A. Yes, I went out and hunted around town for him and my recollection is I met him at, somewhere on Keystone Avenue, one of the side streets, anyway, and asked him if he had seen Mr. Crane and he said, "No,"—I think he said he was in there but didn't see him, and I said, "It would be a good idea to go and see him and if you don't like his proposition, you don't have to take it; go and see him anyway," and we walked along together, came down McKinley

(Testimony of George C. Treat.)

Street down to the Seattle Hotel, went upstairs together to his room, and the door was open a little—

[143—87]

Q. To Mr. Crane's room?

A. To Mr. Crane's room—he was in the act of packing his suitcase, and Mr. Ellis went in and I went out,—I didn't go into the room.

Q. Where did you go after you left there?

A. I went down to Mr. Smith's office.

Q. Did Mr. Smith come in shortly after that, into Mr. Smith's office?

A. Yes, sir, he came in a little while after.

Q. What discussion then took place between you and Mr. Smith and Mr. Ellis when he came into Smith's office?

A. Mr. Ellis came in and, as I remember, it may not be word for word, he wanted to know what we wanted out of this, or what we expected out of it—I don't know, I think he said, would we take our money back with interest or big interest, and Mr. Smith spoke up and said, "We won't; we want our 20% in the property," and there was a little discussion; I don't remember what it was.

Q. What further discussion took place there?

A. Well, we either went out of the room into the next room, or Mr. Ellis went outside, but we decided that we would take 15% during the life of the lease.

Q. Fifteen per cent of the royalties?

A. Yes, sir, for the two interests, during the life of the lease, or 20% in the property.

(Testimony of George C. Treat.)

Q. Retain 20% in the property?

A. Retain 20% in the property.

Q. You heard Mr. Smith's testimony on that point this morning? A. Yes, sir.

Q. Were you present in the room when Mr. Smith told Mr. Ellis what you and Mr. Smith had decided upon? A. Yes, sir. [144—88]

Q. What reply, if any, did Mr. Ellis make at that time? A. He said, "All right."

Q. Was the contract which is referred to in the pleadings as Plaintiffs' Exhibit "D," which was the option contract with Crane, was that made and executed that evening?

A. Yes, sir, that evening—Crane went out that night.

Q. As soon as Mr. Ellis said, "All right," Mr. Smith proceeded to have the contract drawn up?

A. Yes, the contract was drawn up then.

Q. And when the contract was completed, do you know if Mr. Ellis read it?

A. I presume he did read it; we were all there.

Q. Did Mr. Ellis remain in Mr. Smith's office while the contract was being reduced to writing, do you know? A. I can't remember about that.

Q. After the contract was reduced to writing, Mr. Crane was sent for, was he?

A. I think they all came there and signed the contract there.

Q. Mr. Ellis, Mr. Crane, yourself and Mr. Smith?

A. Yes, sir.

(Testimony of George C. Treat.)

Q. And the contract was executed and signed by all of you? A. By all of us.

Q. You, of course, are familiar with the fact that this contract for a lease was finally assigned to Mr. Millard? A. Yes, sir.

Q. Do you remember the execution of that contract, at the time it was executed? A. Yes, sir.

Q. Who was present at the time that contract was executed?

A. There was Mr. Ellis, Mr. Smith, Mr. B. F. Millard and myself.

Q. What was done—what did Mr. Smith do with that lease before it was signed about advising you people who were present about the contents of the lease? [145—89]

A. Well, he passed us a copy of it; we each had a copy—Mr. Ellis and Mr. Smith retained one, Mr. Millard had one and I had one myself and have now.

Q. There were four copies of that lease made?

A. There were four copies of that lease made.

Q. After Mr. Smith passed those copies around, what did Mr. Ellis do with his copy?

A. He read it over and signed it—that is all I remember his doing.

Q. Was there any protest of any kind or nature made by Mr. Ellis at the time of signing that lease?

A. No, sir.

Q. Absolutely no protest made?

A. No, no protest made.

Q. You, of course, are familiar with the fact that

(Testimony of George C. Treat.)

on or about the 4th of August, 1909, Mr. Millard assigned this lease to the Cliff Mining Company?

A. Yes, sir.

Q. Do you now recall the fact of the Cliff Mining Company commencing operations down there on the property in controversy? A. Yes, sir.

Q. Before I progress that far—the time that you visited the property in company with Mr. Smith, Mr. Ellis and Mr. Mills that you have testified to, about how much real development work had been done on the property at that time?

A. Well, there was 20 feet, something like that.

Q. Twenty feet of development work?

A. Yes, sir.

Q. Was there a tunnel commenced to be started at the west edge, at the tide level?

A. Yes, there was a tunnel there of just a few feet.

[146—90]

Q. Just a few feet?

A. My recollection is it was just a few feet.

Q. Where was the rest of the work?

A. The rest of the work was above, I don't know how far, 60 or 70 feet, something like that.

Q. A slight elevation?

A. Yes, sir, a slight elevation.

Q. Was that work done there in taking out this ore that was shipped to the Selby smelter?

A. Yes, I think it was taken out there.

Q. Was there any amount of ore on the dump?

A. No, my recollection is that there was a little there, but not much.

(Testimony of George C. Treat.)

Q. When did you next visit the property, if you can recall, after the Cliff Mining Company took charge of it and started in developing it?

A. I don't know that I was there.

Q. You know of the Cliff Mining Company installing a large amount of machinery, tools, equipment and buildings, on the property? A. Yes, sir.

Q. How long did the Cliff Mining Company retain possession of the property under this lease that was assigned to them by Millard?

A. The keys were turned over to me in August, 1914.

Q. Between the 4th day of August, 1909, and some time in the summer of 1914, the Cliff Mining Company were operating this property as a mine?

A. Yes.

Q. And did they extract considerable gold from the property during that period of time?

A. Yes, sir.

Q. And you received your royalties with the other parties to the lease? [147—91-92] A. Yes, sir.

Q. When you went down in August, 1914, and received those keys, what would be your opinion of the amount of machinery, tools and equipment and buildings that had been placed on that property by the Cliff Mining Company?

A. I couldn't place the value; I don't know about the value of them—I should think they were worth twenty-five or thirty thousand dollars.

Q. During the time that the Cliff Mining Company

(Testimony of George C. Treat.)

was operating this property, do you recall at this time various protests from time to time, signed by yourself, Mr. Ellis and Mr. Smith, directed to the Cliff Mining Company, concerning their operations?

A. Yes, sir.

Q. And you signed those protests, did you?

A. Yes, sir.

Q. Do you remember a certain expense incurred in relation to the adverse of the claim made by a corporation known as the Gold Bluff Company?

A. Yes, sir.

Q. I hand you a paper dated April 1, 1914, entitled, "Cliff Mining Company, Cash Paid Out In Re Gold Bluff Suit," and ask you if your portion was deducted from your royalty in accordance with that statement? A. Yes, sir.

Mr. DONOHUE.—We offer this statement in evidence.

It is admitted as Plaintiffs' Exhibit "I" and is a duplicate of exhibit "G," heretofore admitted and set out in full herein.

Q. In this statement how much of the expense was charged against your royalty, what percentage?

A. Ten per cent. [148—93]

Q. You also recall certain expense for Mr. Bunnell, as attorney, being deducted from your portion of the royalty? A. Yes, sir.

Q. Do you remember at this time what the total fee of Mr. Bunnell was in that matter?

A. A thousand dollars.

(Testimony of George C. Treat.)

Q. What amount was deducted from your royalty to pay your *pro rata* of Mr. Bunnell's charges as attorney? A. Ten per cent.

Q. One hundred dollars?

A. One hundred dollars.

Q. You remember Mr. Storm making a survey of that property some time in the summer of 1910?

A. Yes, sir.

Q. You remember any amended locations being prepared to be posted on the ground after Mr. Storm had completed his survey? A. Yes, sir.

Q. Did you or did you not sign those amended locations? A. I signed them.

Q. Do you know what became of them?

A. Why, Mr. Smith told me he gave them to Mr. Ellis.

Q. Mr. Treat, in your contract of July 9, 1908, you agreed to release Mr. Ellis from all indebtedness that he owed you personally up to that time, as well as the indebtedness that he owed you and Mr. Smith?

A. Yes, sir.

Q. State to the Court, if you now know, how it came about that you did not satisfy the mortgage that Mr. Ellis had given you to secure the \$200 loaned him on the 15th day of December, 1905?

A. Well, I think this contract did cover that—it released him from all obligations to either one of us at that date. [149—94]

Q. Did Mr. Ellis ever demand of you that you satisfy that mortgage of record?

(Testimony of George C. Treat.)

A. No, that was our neglect not doing that—I though I had done it until a short time ago; in fact, it went out of my mind completely.

Q. When did you first learn that that mortgage was not satisfied of record? When was it called to your mind?

A. It has only been recently; I can't tell when it was—it was a short time ago.

Q. Since this suit was filed? A. Yes, sir.

Q. You make no claim against Ellis on account of that mortgage? A. No, sir, never did.

Q. And never have?

A. Never have—it has never been mentioned to my recollection between us from that time to this.

Q. Did you testify that the only demand you ever made on Ellis to repay you this \$200 was some time within a year after the loan was made?

A. Yes, sir.

Q. And after you started negotiations concerning the property in controversy you never made any demands upon him at any time for the payment of that money? A. No, sir.

Q. In the month of August, 1914, you visited this property in controversy, this mining property?

A. Yes, sir.

Q. How came you to go down to the property at that time—what was the occasion of your visit there?

A. I had a letter from Mr. Millard, who was president of the company, to Mrs. McDougall.

Q. You mean Mr. B. F. Millard, the president of

(Testimony of George C. Treat.)

the Cliff Mining Co.? [150—95]

A. Yes, B. F. Millard.

Q. What did he say he gave you?

A. He gave me a letter to Mrs. McDougall, who was watchman there for the company, the Cliff Mining Company.

Mr. GANTY.—We ask that they produce this letter.

By the COURT.—What is the purpose of this?

Mr. DONOHUE.—To show that Mr. Treat, representing himself and Mr. Smith and the other owners, took possession of the property after its relinquishment by the Cliff Mining Company about the middle of August, 1914.

The WITNESS.—About the 17th or 18th of August.

Q. And did you visit the property about that time?

A. I did and delivered the letter to Mrs. McDougall and she turned me over the keys.

Q. And what did you do with those keys on that day?

A. John Hughes was down there, had been there for some time; he told me, in the interest of Mr. Ellis, and as we walked along the beach, I said—

Q. Whom were you speaking to then?

A. To Hughes—Hughes and I were walking together; I had the keys in my hand; I said to Hughes, “You are a friend of Red’s, so am I, and we are old acquaintances, and I think I will turn the keys over to you, and you can act as watchman here for all of

(Testimony of George C. Treat.)

us," and at that time I posted some trespass notices.

Q. You posted some trespass notices?

A. Yes, sir.

Q. And what did you do with the keys?

A. I turned them over to Mr. Hughes.

Q. And you returned?

A. And I returned. [151—96]

Q. Did you visit the property after that?

A. Yes.

Q. When?

A. I don't remember; a little while, not very long after that, I was there again.

Q. Did you, along in the latter part of November or the early part of December, have a conversation with Mr. Hughes whom you left in charge as watchman?

A. Yes; I met him on the street one morning, I think it was, and we stopped and shook hands, and I said, "When did you come up?" and I think he said, as I remember, "Last night," and I asked him who was there, and he said, "Will is there mining, Mr. H. E. Ellis' brother," and I said, "When are you going back?" and he said he didn't think he would go back, and I asked him what he did with the keys and he said, "I turned the keys over to him."

Q. In that conversation was anything said about a cropping or a showing on the property higher up than where the workings had been before?

A. Yes, sir.

Q. What was said about that?

(Testimony of George C. Treat.)

A. He told me of a cropping on the hill that was very rich and he said if he could get a lease of some kind, he could take out quite a bunch of ore between that time and the spring, and I said, "As far as I concerned, that would suit me all right if it would Red."

Q. Speaking of Red, you mean Mr. Ellis?

A. Red Ellis—that was the conversation, in those words, and when Hughes was here he said, "If I knew his address I would write him." [152—97]

Q. He meant Mr. Ellis?

A. Yes, he meant Mr. Ellis, and I said, I think I can get the address of Mr. Ellis.

By the COURT.—Whom were you talking with?

A. Mr. Hughes. I got Mr. Ellis' address and I said, "I think I will write to him myself, we will both write."

Q. I hand you a copy of a letter dated December 4, 1914, addressed to H. E. Ellis, Esq., 310 Ideal Building, Denver, Colorado, and ask you if that is a copy of the letter you wrote to Mr. Ellis at this time.

A. Yes, sir, that is a copy.

Mr. DONOHOE.—We offer this letter in evidence. (Handing to Mr. Ganty.)

Mr. GANTY.—I object to the introduction of this document in evidence on the ground that it is a self-serving declaration.

Mr. DONOHOE.—The purpose of it is to later introduce a reply to this letter which came from Mr. Ellis.

(Testimony of George C. Treat.)

By the COURT.—You say there is a reply to this letter?

Mr. DONOHOE.—Yes, sir.

By the COURT.—It may go in with the reply.

Mr. GANTY.—If here is a reply, I have no objection to it.

Q. I hand you a letter dated first month, 21st day, 1915, 310 Ideal Building, Denver, Colorado, addressed to yourself and signed H. E. Ellis, and ask you if that is the reply you got to the letter I just presented to you.

A. Yes, sir, that is the letter.

Mr. DONOHOE.—We now offer in evidence the two letters.

Mr. GANTY.—We reserve the right to dispute that reply, but I don't think we will.

The letters are admitted in evidence, marked Plaintiffs' Exhibit "J," and read as follows:
[153—98]

**Plaintiffs' Exhibit "J" [Letter, December 4, 1914,
to H. E. Ellis].**

"Valdez, Alaska, December 4, 1914.

H. E. Ellis, Esq.,

310 Ideal Building,

Denver, Colorado.

Friend Red:

I had expected you here some time ago and for that reason I have delayed writing you about the Cliff. Your absence has tied everything up, and with the expense of watching the property piling up I feel

that in justice to us all something ought to be done to get a little revenue from the mine.

In the first place a proposition has been made to me to lease the whole property, but I won't discuss this now. There has been another proposition made to lease only that cropping near the top of the hill and on the east side of the property, above the third tunnel and adjoining the formerly disputed Iles property. With this description you will undoubtedly know the cropping I mean. The lessees will agree to work it this winter, and we all can make a little money by spring.

What do you think of this, and what do you think would be a fair lease? We can, of course, have a clause in the lease that it may be forfeited in case we wish later to lease the whole property.

I wish when you get this letter you would think the matter over very carefully and let me know your ideas about it. I can handle it if you so desire and will send me your power of attorney, with instructions as to what you think ought to be done. If you don't wish to send me the power of attorney, send it to someone else here,—anything so that we can act quickly. All the gold that is in the mine won't do us any good after we are dead.

Things are very quiet here generally, and I don't look to see them get better before late in the winter. Otherwise the town is about the same.

Trusting to hear from you soon, I remain,

Sincerely Yours,

1-21-15.

(Testimony of George C. Treat.)

Plaintiffs' Exhibit "J" [Letter, 1-21-15, H. E. Ellis to Geo. C. Treat].

310 Ideal Bldg., Denver, Colo.

Mr. Geo. C. Treat,
Valdez, Alaska.

Friend George:

Yours of Dec. 4 recd. some time since and have put off answering on acc't of the unsettled nature of things, not knowing whether I would be able to go North immediately or not.

The way things are going I don't know just when I will get started. In regard to a lease I will let that wait until get north and make an examination of the property.

Sincerely yours,

H. E. ELLIS."

Q. You are familiar with Mr. Ellis' handwriting?

A. Yes, sir.

Q. And you know that that is in his handwriting?
[154—99] A. Yes, sir.

Q. When did you first learn that Mr. Ellis was disputing your right to a ten per cent interest in the property in controversy in this action?

A. When Mr. Hughes went to work down there.

Q. What time, about, was that?

A. Well, it would be near the time of the date of this letter, as near as I can place it.

Q. Some time early in 1915? A. Yes.

Q. What did you learn about Mr. Hughes going to work there? What do you mean by him going to work?

(Testimony of George C. Treat.)

A. I learned he had got a letter from Mr. Ellis—I never saw the letter and don't know what it contained,—outlining a proposition for him to go down there and go to work on this cropping.

Q. You understand that Mr. Ellis gave Mr. Hughes a lease?

A. That is what I understand.

Q. And you were not consulted as to the terms of that lease? A. No.

Q. Now, was there any time previous to that, by either word or act, that Mr. Ellis ever disputed your right to a ten per cent interest in that property, after the execution of the Crane contract on the 5th day of June, 1909? A. Never at any time.

Mr. DONOHUE.—That's all [155—100]

Cross-examination by Mr. GANTY.

Q. Have you very often asserted your ownership of a ten per cent interest in that property since the execution of that Crane lease?

A. Quite a good many times.

Q. Whom to?

A. I don't know, several people.

Q. Have you ever asserted it to Mr. Ellis?

A. I don't think it ever came up between us.

Q. At the time the contract to incorporate the property owned by Mr. Ellis was made and entered into between yourself and Mr. Smith and Mr. Ellis, what interest did you claim in the property at that time?

By the COURT.—What time is this?

(Testimony of George C. Treat.)

Mr. GANTY.—At the time the agreement to incorporate was entered into.

The WITNESS.—Up to the time the incorporation papers were drawn?

Q. At that time, at the time of the execution of the incorporation what interest did you claim?

A. That was when we got the interest, right then, when the incorporation papers were drawn.

Q. What interest did you have prior to that?

A. We had the interest of the money we put up.

Q. Did you acquire any further interest in this property beyond that you acquired under the agreement to incorporate? A. No.

Q. For what reason did you decide to take 15% of the royalty under the option lease to Crane?

A. For this reason—this Mr. Crane was the only man that we had come across that looked likely to go through with a proposition [156—101] of that kind, and had the money to do it, said he had, and we were both anxious to get the proposition through,—that was the reason why. Mr. Ellis thought that the interest of 20%, ten each, was too much; that was the reason we dropped to 15 during the life of the lease.

Q. You considered yourself then as the real owner of a tenth interest in the property, did you?

A. Yes, sir.

Q. What had you done to acquire that tenth ownership? A. Advanced this money.

Q. That was your reason?

A. That was enough, wasn't it?

(Testimony of George C. Treat.)

Q. Did you at that time, at the time that the option of lease to Crane was entered into, represent to Mr. Ellis that you were entitled to a 20% interest in his property, that is, yourself and Mr. Smith?

A. At the time of the Crane contract and option?

Q. Yes. A. Yes.

Q. And at that time you agreed, did you, with Mr. Ellis, that you were to receive 15% of the royalties paid under this option of lease?

A. Yes, sir, during the life of the lease.

Q. And you say that Mr. Ellis agreed to it?

A. He did.

Q. I think that you testified that just prior to this arrangement having been made between yourself and Mr. Ellis that he came to you and asked you what you would take in settlement of your [157—102] claims against the property, or your interest, or the money advanced or something?

A. He asked us if we would take our money back with interest, good interest; we told him no, we would not do it, we had brought it up to a point where we had found a man who was willing to take an interest in it, or all of it, and then to take our money back, we told him we wouldn't do it.

Q. He denied your interest in the property at that time, did he not? A. No, no denial.

Q. Didn't he say it was too much?

A. The 20% he said was too much and that is why it was dropped to 15 during the life of the lease, but we still retained that 20% in the property.

Q. What did you do, aside from endeavoring to sell

(Testimony of George C. Treat.)

the treasury stock of this corporation, towards earning a fifth interest in that property?

Mr. DONOHOE.—We object to that as irrelevant—the contract speaks for itself.

By the COURT.—He said a good many times he advanced this money. 'Objection sustained—defendant allowed an exception.

Q. At the time of signing this agreement to incorporate then, you did not, in fact, release Mr. Ellis from this contract and mortgage for \$500, did you?

A. No, except in that contract—I considered that squared everything between us—I did fail, to cancel the mortgage in pure neglect, forgot it—I considered the amount paid, however.

Q. You verified this complaint, did you not, Mr. Treat? A. I think so.

Q. You swore to the facts in the complaint?

A. Yes, sir.

Q. It states in paragraph 6 of the complaint, as follows: [158—103]

“That on the execution of the contract last set out, plaintiffs Treat and Smith did release defendant from and receipt to him in full for said sum of Five Hundred Dollars, and plaintiff Treat surrendered and delivered said promissory note to defendant and released him from all obligation thereon. Is that correct?

A. No, that is not correct, but the way you refer to the note there I presume the mortgage speaks of a certain promissory note of even date and I take it for granted there was a note given—but I am quite

(Testimony of George C. Treat.)

sure there was not, since thinking it over; the mortgage was given, but the note I am very much in doubt of.

Q. About what date was it, if you remember, when you first met Mr. Crane?

A. I met Mr. Crane perhaps three or four days prior to the drawing of this option contract, somewhere about that time, a few days before.

Q. Where is Bob Coles now, if you know?

A. I don't know.

Q. You say he introduced you to Mr. Crane?

A. He did.

Q. Whereabouts was that? A. In Valdez.

Q. And then you took Mr. Crane, you say, to Mr. Ellis? A. No, I took Mr. Ellis to Mr. Crane.

Q. You went and hunted up Ellis? A. Yes, sir.

Q. Where did you introduce them?

A. If you want the exact spot, I don't know that I can tell you—here in town, Valdez; my recollection is that it was on the postoffice corner, but I am not sure of that—I stood there talking with him, but it might have been in the hotel; I can't remember just where it was. [159—104]

Q. And after that you had several conversations with Mr. Ellis and Mr. Smith regarding the option of lease? A. Yes, sir.

Q. Did Mr. Crane go down to see this property before he entered into negotiations with you for the lease? A. Yes, sir.

Q. Did you go with him?

A. I think I did, but I am not positive; I remember

(Testimony of George C. Treat.)

his asking me if Mr. Ellis would be willing for him to go to the property and my recollection is I told him I would go with him and my recollection is I went down with him and also a man he had with him, his name I don't remember.

Q. Do you remember the conversation you had with Mr. Mills down at the mine at the time Mr. Mills went down there, can you remember the words said by the parties down there? A. Yes, sir.

Q. When did you go down there with Mr. Mills?

A. I can't remember.

Q. About what year?

A. It was 1908, I should think, somewhere there, I don't remember—it was in the summer.

Q. You can't even be positive whether you went down with Mr. Crane or not?

A. I am positive, I am quite sure I went down with both of them—I know I went down with Mr. Mills.

Q. You are absolutely certain you went down with Mr. Crane?

A. I say I am not positive I went with Mr. Crane, but I think I did.

Q. How long was it after you first introduced Mr. Crane to Mr. Ellis that he went down there and you think you might have accompanied him? [160—105]

A. My recollection is they went down the next day after they met.

Q. And how long after that was it that Mr. Ellis came and asked you and Mr. Smith what you expected out of this?

(Testimony of George C. Treat.)

A. I can't remember, perhaps two days, something like that—I don't remember the time.

Q. That is the day when you said, we want 20% in the property?

A. That is the day—it was the night—it was after the meeting at seven o'clock; it was during that evening, the same night that Crane went out; that is my recollection of it.

Q. Now, you stated that you went down to the Cliff some time in August, 1914—can you locate the date with any exactness?

A. Either the 17th or 18th.

Q. How did you come to go down there at that time?

A. I went down there after I got a letter from Mr. B. F. Millard for the delivery of the keys from Mrs. McDougall to myself—that is what I went down there for, to put a watchman in charge.

Q. Who did you find at the property at that time?

A. Mrs. McDougall and Mr. Hughes.

Q. And you got the keys from Mrs. McDougall?

A. Yes, sir.

Q. Did she hand them to you?

A. She gave them to me, yes. Put them in my hand, do you mean? I remember now the little house she was living in was near the shore and above it was a log; my recollection is she laid them on that.

Q. And you state you turned them over to Mr. Hughes? A. Yes, sir.

Q. Did you pay Mr. Hughes for his services down there? A. I did not.

(Testimony of George C. Treat.)

Q. Did he ever agree to accept payment from you?

A. I told Mr. Hughes when I turned the keys over to him that I would be responsible for the wages there. I asked him if there was anything he needed in the way of provisions, etc., and he said he did not and I gave him the keys. [161—106—108]

Q. You have never paid him, have you, since then?

A. Never paid him.

Q. Has he ever asked you to pay him?

A. Never has.

Q. Did he ever tell, either at that time or within a few days thereafter, that he was there representing Mr. Ellis and no one else, the defendant here?

A. He told me he was down there for Mr. Ellis; he told me that he was down there, not watching the property but that he was down on the property. The property was then—

Q. I asked you if he ever told you that he was representing Mr. Ellis and holding it for Mr. Ellis alone?

A. No, he said he was down there representing Mr. Ellis.

Q. Did you ever get a letter from him, stating he was down there representing Mr. Ellis?

A. I never have.

Q. You went down there to get some steel shortly after this episode of the turning over of the keys to you? A. Yes, sir.

Q. Did you get the steel? A. I did not.

Q. Who was this Will Ellis you speak about?

A. Why, he said he was Mr. H. E. Ellis' brother.

(Testimony of George C. Treat.)

Q. Did you know him to be Mr. Ellis' agent?

A. I did not.

Q. Did he ever represent himself as such to you?

A. Not as I know of—I had very little talk with him anyway. I saw very little of him; we rode up from the mine one night.

Q. Was that the time you took some notices down there to Mr. Ellis?

A. No, I think that was after.

Q. You did take some notices down there at one time? A. Some trespass notices?

Q. Yes. [162—109]

A. Yes, I took them down at the time I had the letter for the delivery of the keys.

Q. You asked Mr. Will Ellis to sign his brother's name to them, did you not?

A. I did not. I signed them and Archibald signed them and I asked Mr. Hughes to ask Mr. Will Ellis or tell Mr. Will Ellis that he ought to sign them for his brother.

Q. How did you come to ask that he sign, or ask Mr. Hughes to get Mr. Ellis' brother to sign his name thereto, if you did not consider he was an agent of Mr. Ellis?

A. Out of courtesy, nothing else—I didn't care whether he signed them or not, as far as I was concerned.

(By Mr. DONOHOE.)

Q. Mr. Treat, during that time that the Cliff Mining Company were operating this property, you from

(Testimony of George C. Treat.)

time to time received settlement statements, from them, did you not, embodying your royalty?

A. Yes, sir.

Q. And in those statements received from time to time there were sometimes expenses chargeable against your proportion of the royalty?

A. Yes, sir.

Q. I hand you a paper entitled, George C. Treat in account with the Cliff Mining Company and ask you if you received this as part of your settlement statement of February, 1914? A. Yes, sir.

Mr. DONOHOE.—We offer this in evidence.

It is admitted, without objection, marked Plaintiffs' Exhibit "K," and reads as follows: [163—110-111-112]

Plaintiffs' Exhibit "K" [Statement—George C. Treat with Cliff Mining Co.].

George C. Treat
in Account With
Cliff Mining Company.

To 10% of cost of patent		
Expense	34.11	By Feb. Royalty.. 313.35
To 10% of cost of Gold		
Bluff suit	100.00	
Check to balance account	179.24	
	<hr/>	<hr/>
	\$313.35	\$313.35

(By Mr. GANTY.)

Q. In this statement, which you say was handed to you, that is regarding a charge for patenting the Cliff mine, is it?

A. In the adverse suit, the Gold Bluff suit, it was \$100 I think also.

(Testimony of George C. Treat.)

Q. When did you get that statement?

A. Why, I don't remember when I got it,—I can find out the date of it, but I don't remember. I don't remember the date, I would have to refer to the statement to find out.

Q. Your statement of royalties would be I suppose a month after the royalties accrued?

A. Yes.

Q. The month after the royalties run?

A. Yes, sir.

Q. Did you get a big lot of these statements, similar to these, all together at one time?

A. At this particular time?

Q. When you got this statement here, introduced in evidence.

A. Yes, I think there were two or three.

Q. How many months did they cover?

A. I don't know, they are all right there.

Q. Did you ever make any protest against paying this ten per cent? This 10% of the cost of the Gold Bluff suit? A. No, sir.

Q. Did Mr. Ellis ever request you to pay it?

A. No. [164—113]

Q. Did you think you ought to pay it?

A. I don't see why I shouldn't.

Q. You don't agree with Mr. Smith then in the idea that the Cliff Mining Company should pay the costs of this adverse under the terms of their lease?

A. Yes, I do.

Q. And yet you paid it, without protest, this \$100?

A. Yes, sir.

(Testimony of George C. Treat.)

Q. Is it not a fact that you paid it so as to establish a cause of title to this property?

A. Never entered my mind.

Q. You didn't realize at the time that it might be evidence in your case? A. No, sir.

Q. Did you pay it in cash?

A. It was taken out of the royalty, out of my royalty.

Q. Did Mr. Ellis ask you to pay that percentage of the patent proceedings charged here in this statement?

A. Mr. Ellis never asked me to pay anything.

Q. Do you know whether he knows or not that you ever paid any of this? A. I don't know.

Q. Are you a stockholder in the Cliff Mining Company? A. Yes, sir.

Q. Are you an officer and director of that company? A. No, sir.

Witness excused.

[Testimony of Charles Kraemer, for Plaintiffs.]

CHARLES KRAEMER, called and sworn as a witness in behalf of the plaintiffs, testified as follows: **[165—114—115]**

Direct Examination by Mr. DONOHOE.

Q. Are you acquainted with the Cliff Mining Company? A. Yes, sir, I am.

Q. Did you for some time occupy the position of bookkeeper for the Cliff Mining Company?

A. Yes, sir, I did.

Q. You were secretary of the corporation?

(Testimony of Charles Kraemer.)

A. Yes, sir.

Q. Did you have the duty of preparing statement sheets with the owners of the Cliff mine and apportioning their royalties? A. Yes, sir.

Q. Are you acquainted with Mr. Will Ellis?

A. Yes.

Q. A brother of H. E. Ellis? A. Yes, sir.

Q. Do you know if during the year 1914, Mr. Will Ellis was the agent of Mr. H. E. Ellis in connection with the Cliff Mining Company?

A. I didn't know it for sure until I received a wire from Mr. Ellis.

Q. State how you came to receive that wire from Mr. H. E. Ellis.

A. Well, Mr. Will Ellis came in and demanded the royalty and I asked him if he had a power of attorney or was agent for Mr. Ellis; he said, no, only he was supposed to be, was known as his brother's agent. I explained the matter to him and told him I couldn't pay out the money to him without an order from Mr. Ellis. Evidently he wired or the bank wired because Mr. Ellis sent a wire to me or to the Cliff Mining Company.

Q. Authorizing you to pay the money to Mr. Will Ellis? A. Yes, sir.

Q. I hand you a paper that has been introduced in evidence as Plaintiffs' Exhibit "I," which has the heading on it—Cliff Mining Company, Cash Paid out in re Gold Bluff suit, April 1st, 1914, and on the bottom there is noted on it, George C. [166—116] Treat, and ask you if you prepared that statement?

(Testimony of Charles Kraemer.)

A. Yes, I did.

Q. Is that a statement you prepared for Mr. Treat? A. Yes, sir.

Q. Was the statement prepared for Mr. H. E. Ellis a duplicate of this statement?

A. There were five copies made of that statement.

Q. And what did you do with the statement that you prepared for Mr. H. E. Ellis?

A. Mr. Will Ellis took the statement.

Q. You delivered it to him personally? A. Yes.

Q. Was there at that time anything said by Mr. Will Ellis as to charging a portion of the expense as recited in that exhibit against Mr. Treat and Mr. Smith and Mr. Archibald?

A. I don't think there was; I don't think there was anything said about it at all.

Q. Did you in your experience as secretary of the Cliff Mining Company and as its bookkeeper, ever, at any time, receive any information from Mr. H. E. Ellis that such expense as recited in Plaintiffs' Exhibit "I" should be charged to him alone and not to Mr. Treat and Mr. Smith and Mr. Archibald?

A. No, I don't recollect of any.

Q. If such a statement had been made to you, you would be apt to recollect it?

A. Yes, I would have had to take it up before the board of directors.

Q. You are familiar with the transaction of Mr. Smith where he sold half his interest to Mr. Archibald, you heard of that, did you not?

(Testimony of Charles Kraemer.)

A. Yes, sir. [167—117]

Q. Did you on or about the time that transaction took place have a conversation with Mr. H. E. Ellis in which you enquired as to the ownership of the Cliff mining property? A. Yes, I did.

Q. State that conversation as near as you can recollect it at this time?

A. I think it was about the time that Mr. Archibald came back from Seattle and told me of having bought a half interest from Mr. Smith, half of Mr. Smith's interest, and in some way, I don't know how, Archie told me at that time that Mr. Smith couldn't give him a deed for the property, as they had no deed from Mr. Ellis to him. Anyway, I think I myself afterwards asked Mr. Ellis if they had an interest in the property and all Mr. Ellis said at the time was, the records don't show anything, do they, and nothing more was said about it at that time.

Mr. DONOHOE.—That's all.

Cross-examination by Mr. GANTY.

(By the COURT.)

Q. Do you know of these statements being given to Mr. Ellis personally, to Mr. Ellis himself, Mr. H. E. Ellis, showing wherein he was charged 80% of certain expense or items in the account of the Cliff Mining Company with him and which was deducted from his royalty?

A. Only the same statements that the other ones received which I made a copy of.

Q. Did he get such statements from time to time

(Testimony of Charles Kraemer.)

during the runing of this lease, while you were secretary?

A. Yes, sir, everything was deducted from his royalty.

Q. That is the expense would be charged to the owners as against the [168—118] royalty, when he would be charged 80% of that?

A. Yes, sir—that is, all the items that came up that were to be charged to the owners, he received the same statement as the rest of them did.

(By Mr. GANTY.)

Q. (Continued.) Do you understand that that statement of April 1st, 1914, was handed to Mr. Ellis personally?

A. Not personally but to Mr. Will Ellis.

Q. Did you say there were others in which that proportion of ownership was shown of 80%?

A. I don't know how many there would be without looking at the books, but if there were any charges against the owners, they were always made out 80 and 20.

Q. You are not making any declaration that there were any others outside of this one here?

A. No, sir.

Q. Is it not a fact that there are no others?

A. That is all I can recollect at the present time of those charges.

Q. Do you know to whom Mr. Ellis's copy of this particular statement was handed?

A. Well, Mr. Ellis was out at that time and I am quite certain it was handed to Will, but I am not

(Testimony of Charles Kraemer.)

sure about that either, because I went inside the latter part of May of this season, this year, and I don't know whether this was held in the office until after I left or not.

Q. But it is a fact that during Mr. H. E. Ellis' absence from Valdez, the Cliff Mining Company has recognized Mr. Will Ellis as his agent here in matters pertaining to the Cliff Company, is it not?

A. Yes, sir. [169—119—120]

(By the COURT.)

Q. There were certain protests filed, signed by Ellis, Treat and Smith, against certain charges made by the Cliff Mining Company—were they made while you were secretary? A. Yes, sir.

Q. Were those items which were protested against, were they divided up in this manner, 80% and 10% and 10%?

A. No, they were taken in in the mining and milling account, they had nothing to do with the ownership—the way I figured out this lawsuit—

Q. That came out of the royalty as an advance?

A. Yes, sir.

Q. It wasn't a question of a division of the royalties?

A. No, the way we figured, the board of directors of this company had nothing to do with the division of the charges between the owners, and that is the reason I made the charges 80 and 20%.

(By Mr. GANTY.)

Q. (Continuing.) Were those charges made at the request of Mr. Ellis? A. No.

(Testimony of Charles Kraemer.)

Q. Did Mr. Ellis ever request you or any other officer of the Cliff Mining Company to charge up Treat and Smith with any portion of these charges?

A. No, he did not.

Q. Then who determined this proportion?

A. The board of directors of the Cliff Mining Company.

Q. Is it not a fact that Mr. Ellis has protested against paying this attorney's fee to Mr. Bunnell at all?

A. He did not do it while I was there—it might have been done when I was inside last summer; I was inside during the month of June, July and part of August.

Q. Who was in charge of the Company's affairs when you were inside? [170—121]

A. Frank Millard was keeping the books.

Q. What other officers of the company were in town at the time you left to go inside?

A. Mr. Millard was in town and Mr. Archibald.

Q. (By the COURT.) Were those books destroyed by fire? A. No.

Q. (By the COURT.) Was the correspondence of the company destroyed by fire?

A. Yes, all the letters were burned up—there is nothing but the vouchers and letter-book.

By the COURT.—Who has charge of the books now?

Mr. DONOHUE.—I imagine Mr. Martin has them in his custody.

(Testimony of Charles Kraemer.)

The WITNESS.—Yes, they are in Mr. Martin's custody.

By the COURT.—I would like to have the books showing these various statements and dealings with Mr. Ellis and Mr. Treat and Mr. Smith.

Adjourned until ten o'clock to-morrow (Wednesday) morning.

Wednesday, October 6, 1915.

MORNING SESSION.

Mr. DONOHE.—I will state that we have here the books of the Cliff Mining Company.

By the COURT.—Inasmuch as the question was raised here about the defendant Ellis not having notice of this statement of April 1st, 1914, wherein it is shown that he was charged 80% of certain expense by reason of his supposed ownership and the plaintiffs, Treat 10%, Smith 5% and Archibald 5%, and inasmuch as that point seems to have been rather emphasized, I want to see if there is anything in these books that will clear that up and show whether there were any such statements made.

Mr. DONOHOE.—If the defendants care to examine the books, we have [171—122—125] them here—we will look through the books carefully.

Mr. GANTY.—I thought we might ask Mr. Kraemer to point out such entries, if he knows of any.

By the COURT.—You might look them over during the noon recess.

Mr. GANTY.—Then we will recall Mr. Kreamer later for further cross-examination.

Mr. DONOHOE.—We will call Mr. B. F. Millard.

[Testimony of B. F. Millard, for Plaintiffs.]

B. F. MILLARD, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. How long have you resided in and about Valdez? A. Seventeen years.

Q. What has been your occupation during your residence here? A. Prospecting and mining.

Q. You are acquainted with Mr. Edmund Smith, Mr. Treat and Mr. Archibald, plaintiffs in this case?

A. Yes, sir.

Q. And Mr. H. E. Ellis? A. Yes, sir.

Q. You were president and manager of the Cliff Mining Company during its existence or the greater portion of it? A. Yes, sir.

Q. Were you acquainted with one A. J. Crane who took an option on the property in controversy along in June, 1909—took an option for a lease?

A. Yes, sir.

Q. Did you afterwards succeed to the rights of Mr. Crane in that lease? A. Yes, sir, I did.

Q. What did you pay Mr. Crane for that lease?

A. Four hundred dollars. [172—126]

Q. Now, on July 23, 1909, as assignee of that Crane option, you entered into a full lease with certain parties, Mr. Ellis, Mr. Smith and Mr. Treat, for the property in controversy, did you not?

A. I entered into a contract of lease, yes, sir.

Q. That lease was executed, was it not, in Mr. Smith's law office in the town of Valdez?

A. Yes, sir.

(Testimony of B. F. Millard.)

Q. Do you know who was present at the time that lease was executed?

A. All of the parties to the lease.

Q. State if Mr. Ellis at that time, upon the execution of this lease, made any protest or objections against executing the lease as it was?

A. I don't remember of any such.

Q. Had he made any protest openly you would have been apt to have heard of it, would you not?

A. I presume so.

Q. When you took over possession of the property in controversy under this lease of July 23, 1909, what development work was done upon the property at that time?

A. Well, at what we call the sea level, it was fairly well faced up, just about facing up the tunnel.

Q. How much underground was it, would you say?

A. Very little underground, to my recollection.

Q. A foot or so?

A. Probably a couple of feet, or such a matter.

Q. The next level, what was there?

A. About that there was a tunnel 12 or 14 ft. in, boarded up in front and blocked up.

Q. At the time you took it over, did you sample and assay the depth of the tunnel? A. Yes, sir.

Q. What results did you get, in gold?

A. Seven dollars a ton. [173—127]

Q. That was about all the development work that had been done on the property at the time you took it over?

(Testimony of B. F. Millard.)

A. Well, there was a trail leading up to the property.

Q. That was all the underground mining work that was done? A. Yes, sir.

Q. During the time that the Cliff Mining Company was in possession of this property, operating it under this lease, do you recall certain expenses paid by the Cliff Mining Company off and on, for and on account of the lessors, in connection with a suit known as the Gold Bluff suit and adverse?

A. I recall the argument whereby we paid the expense.

Q. I hand you the statement here, marked Plaintiff's Exhibit "I," which shows these charges charged against the lessors, 80% to H. E. Ellis, 10% to George C. Treat, 5% to Edmund Smith and 5% to Logan Archibald and ask you if those charges were made in accordance with instructions received from Mr. Ellis?

Mr. GANTY.—I offer the same objection—we have the books here.

By the COURT.—If it is not correct, you may show it by the books.

A. As I understand it, this is correct.

Q. Do you recall Mr. Ellis, at a meeting of some of the officers of the Cliff Mining Company, instructing those charges to be made and deducted from the royalty?

A. As I understand it, Mr. Ellis instructed us to go ahead and defend the property and charge it against the royalties.

(Testimony of B. F. Millard.)

Q. What was the value of the machinery, tools, buildings and equipment left upon the property when the Cliff Mining Company surrendered possession of it to the lessors?

A. That would depend largely upon what you wanted to do with it. If there are values in the property and you want the mill and machinery and tools where they are, they are worth \$35,000, the entire equipment of the property, but if you had to remove [174—128] it, it would be a different proposition.

Mr. DONOHOE.—That will be all.

Cross-examination by Mr. GANTY.

Q. You were asked by Mr. Donohoe something concerning a protest, whether it was made by Mr. Ellis at the time this lease was signed between yourself and the parties to this action for the Cliff Mine—I would ask you who was present at the time the lease was signed?

A. Why, if I recollect right, all the parties were present.

Q. Did you all get there together?

A. I couldn't say we all went in at the same time.

Q. You don't remember that?

A. I don't remember that, if we all went in at the same time, no.

Q. Do you remember whether you were there first or got there last?

A. I don't remember whether I was there first or got there intermediate.

Q. You don't know whether there was any con-

(Testimony of B. F. Millard.)

versation between the other parties about signing before you arrived and became one of the party?

A. I don't know anything about the private affairs of the other gentlemen.

Q. Then a protest might have been made by Mr. Ellis to this lease and you know nothing about it?

A. It might have been made privately, certainly.

Q. And when you stated that if any had been made, you would have known about it, you mean after you arrived there?

A. I think I made the statement, not to my knowledge—I don't remember any such statement or any such protest.

Q. Did you state you could recall the agreement by which you were to pay these expenses of fighting the protest suit, the Gold Bluff adverse suit?

A. The protest and patenting and surveying of the property. [175—129]

Q. That is what you call the patent proceedings?

A. There were two suits—one was a suit for an interest or adverse and another that would naturally come in as against the patent.

Q. Who was present when this arrangement was made with Mr. Ellis that you spoke about?

A. Mr. Lathrop and myself.

Q. Where was it made?

A. In Mr. Lathrop's office.

Q. And can you remember the exact agreement?

A. Why, as I remember it, the agreement was that we should go ahead and defend the property against the adverse, proceed to patent and agree upon an

(Testimony of B. F. Millard.)

attorney, and charge the expense of patenting and defense up to the royalties.

Q. That was an oral agreement, was it?

A. That was an oral agreement.

Q. Did Mr. Ellis ever repudiate that understanding? A. Not to me.

Q. To your knowledge? A. No, sir.

Q. Have you ever heard it mentioned among any of the directors of the Cliff Mining Company that he refuses to acknowledge any such understanding?

A. I don't remember it ever coming up in a meeting.

Q. Did you ever hear of it coming up at all?

A. I have—I have heard since that he hadn't repudiated it, but didn't want to pay it.

Q. He denies that there was such a contract, doesn't he?

A. Not to my knowledge, he does not.

Q. He simply refuses to pay, is that the idea?

A. As I understand it, he refused to pay it. [176—130]

Q. How long since you have so understood it?

A. I don't remember how long it is.

Q. Aren't you aware, as president of the Cliff Mining Company, that Mr. Ellis maintains that the Cliff Mining Company should defend and pay the costs of defending the ground against all trespass and encroachments under the lease?

A. Not by any means—I never understood any such thing, we absolutely refused to do it.

Q. But Mr. Ellis made that contention, didn't he?

(Testimony of B. F. Millard.)

A. Mr. Ellis wanted us to do it and we refused, when he gave us authority to do it on his account.

Q. Then you admit now that Mr. Ellis did require you—or take that stand, that the Cliff Mining Company should pay these adverse costs?

A. Mr. Ellis tried to get the Cliff Mining Company to do it, which they refused to do. It was none of our interests whatever, we didn't care whether it was defended or not, it didn't affect our ground that we were working.

Q. That was your contention?

A. That was our contention.

Q. But Mr. Ellis, of course, claimed that under the terms of the lease by which you held the ground, you were bound to defend it?

A. He didn't mention the terms of the lease—he simply wanted us to do it.

Q. Did he have any reason at all?

A. I don't know what his reasons were.

Q. You don't remember this lease question being brought up at all at that time?

A. Not in the presence of Mr. Ellis.

Q. Was it brought up by any of the directors of the company? [177—131]

I don't know as I am entitled to tell all the secrets of the company.

Mr. GANTY.—I think you testified that to your knowledge it had not been brought up—I will leave it to the Court whether you have to answer or not.

By the COURT.—You may answer the question.

The WITNESS.—We discussed it.

(Testimony of B. F. Millard.)

Q. Did you discuss that feature of the lease, as applied to your having to defend the premises against this adverse suit?

A. Yes, sir, we did, and got advice on it.

Q. You got advice on it? A. Yes, sir.

Q. And it was on that advice—

A. It was on that advice that we took the ground that he had nothing to do whatever with defending a lawsuit against it.

Q. Then it is a fact, is it not, that you got that advice because Mr. Ellis made the claim that you should defend it at your expense? A. Certainly.

Q. Did you get that advice before or after you had this agreement with Mr. Ellis about charging it up to the royalties?

A. I have forgotten just when we did get it.

Q. Did you ever notify Mr. Ellis personally as to how much had been charged up against him on account of this adverse suit?

A. I never notified Mr. Ellis on anything—I had nothing to do with that branch of the business.

Q. Did you ever instruct any officer of the company to do so? A. Personally, no.

Q. Do you know of your own knowledge that it was done?

A. I know the board instructed him to do it.

Q. Instructed who? [178—132]

A. Mr. Kraemer, the secretary, the acting secretary.

Q. When was he so instructed, if you remember?

A. I can't remember just exactly when—at the

(Testimony of B. F. Millard.)

time this controversy was up.

Q. On what date did the Cliff Mining Company give up these premises?

A. If I remember correctly I signed a notice that we would abandon the property and give it up on the 15th day of August, last year; that is my recollection. The books will show that.

Q. They were sent to everybody that was interested, Mr. Treat, Mr. Archibald, Mr. Ellis, if we knew his address—I am not positive whether we did or not; I never knew it, but we tried in every way to reach him by registered mail, I think.

Witness excused.

[Testimony of J. R. Crittenden, for Plaintiffs.]

J. R. CRITTENDEN, a witness called and sworn in behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. DONOHOE.

(The testimony of this witness is reduced to the following recital:) I am acquainted with Edmund Smith, one of the plaintiffs in this action and also with defendant H. E. Ellis. Some time in the end of June or beginning of July, 1909, I had occasion to call at the office of Mr. Edmund Smith and found both Mr. Smith and Mr. Ellis there. Referring to the rumor of a lease of the Cliff property to Mr. Crane or Mr. Millard, I congratulated Red—that is Mr. Ellis—in these words: “You are all right Red, if you haven’t too many partners.” To which Mr. Ellis replied, “I haven’t but two partners, Mr. Smith and Mr. Treat.” Mr. Smith then said: “Red is on the road now to be the wealthiest man of Valdez”;

(Testimony of J. R. Crittenden.)

to which Mr. Ellis responded, "You will do pretty well with your tenth, if I do pretty well with what I have got." I am not sure of the exact words used but that is the substance of them.

Witness excused. [179—133—136]

[Testimony of Logan Archibald, for Plaintiffs.]

LOGAN ARCHIBALD, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination by Mr. DONOHOE.

Q. What is your name? A. Logan Archibald.

Q. Where do you reside?

A. Valdez, most of the time.

Q. How long have you lived in Valdez?

A. Since 1903, more or less.

Q. Are you one of the plaintiffs in this case?

A. Yes, I believe I am.

Q. You are claiming a 5% interest in what is known as the Cliff property? A. Yes, sir.

Q. When did you buy that?

A. Why, I think it is three years this fall, is it not, Judge? Or two. (Witness addresses Mr. Edmund Smith, as Judge.)

Mr. DONOHOE.—You will have to testify of your own recollection.

A. It is two or three years, I am not sure—I didn't look it up; two years last fall.

Q. From whom did you buy that?

A. Edmund Smith.

Q. Where did the transaction take place?

A. In Seattle.

Q. You have a deed for that, have you?

(Testimony of Logan Archibald.)

A. Yes, sir.

Q. Did you make any examination of the title or have it made for you?

A. I had the lease examined and the lawyer that passed on the lease told me he thought it was absolutely good.

Q. Does that lease show whether or not it was of record at that time? A. The lease of record?

Q. Yes. [180—137]

A. Yes—I had a copy of the lease, not the lease that had been recorded.

Q. Did you ever talk to Mr. Ellis about the title to this property when you were in Valdez, prior to purchasing this interest? A. I never have.

Q. You had no knowledge of the title except what the record shows? A. What the lease showed.

Q. And based on that lease and the fact that it was of record, you made the purchase?

A. Based on the lease and the advice from my lawyer, yes.

(By Mr. GANTY.)

Q. At the time you were asked if you were one of the plaintiffs in this case you said I believe I am—what do you mean by qualifying that?

A. Well, I had a warranty deed to that and he was to protect the title, if there was any question about the title. He was to protect my title and the interest.

Q. He was to protect your title and the interest?

A. Yes, sir.

Q. Who was the attorney that examined it?

A. Judge Reed—he was in Seattle at the time.

(Testimony of Logan Archibald.)

Q. What did he examine, the title?

A. He examined the lease.

Q. He examined the lease and on examining the lease told you the title was perfectly good?

A. If I remember right that is what he told me—he said, if Ellis owns 80% and they don't own the other 20%, who does own the other 20, Ellis claiming to own only 80%.

Q. That is the way he talked to you about it?

A. Yes, sir. [181—138]

Q. Did you ever talk to Mr. Ellis about this purchase of yours since you made it?

A. Never, before or since.

Q. Did you notify Mr. Ellis that you had purchased an interest from Mr. Smith in this property?

A. I never did.

Q. Why didn't you?

Mr. RITCHIE.—We object to that as irrelevant.

Objection sustained—Defendant allowed an exception.

Q. You stated something about a guaranty of the interest, what was that?

A. It wasn't a guaranty, it was a warranty deed, protecting against everything and against the government, that is, if anything was to come up, he was to protect me against it, just like a warranty deed for anything else.

Witness excused.

Statement of Mr. Donohoe Re Amendment to Complaint.

By Mr. DONOHOE.—It is plaintiffs' desire to move to amend their complaint to conform with the proof. There is a divergence between the proof and the complaint. We desire to amend paragraph 6 as shown on page 6, commencing on the eleventh line from the bottom of that paragraph with the word "hold" and ending with the word "and" on the tenth line from the bottom. The part we desire to strike out is as follows:

"hold said contract of July 9, 1908, in abeyance and"

And in the same paragraph we desire to strike out all that part of the paragraph commencing on the 8th line from the bottom, after the word "Crane" to the end of the paragraph, reading as follows: [182—139-140]

"At which time defendant specifically agreed verbally to and with plaintiffs Treat and Smith that at the termination of said lease he would join Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and would carry out all of the terms of said contract to be performed by him thereunder, or, that he, defendant, would deed to each of plaintiffs Treat and Smith an undivided one-tenth interest in and to each and all of said mining claims."

We also desire to amend paragraph 13 by striking therefrom, on the third line from the top of the paragraph, after the letter "C," down to and including

the word "but" on the seventh line from the top of said paragraph, the part to be stricken reading as follows:

"the plaintiffs herein have been ready, able and willing to perform all of the matters and things to be performed by them, pursuant to the contract of July 9, 1908, heretofore set out, but"

And further in the same paragraph, commencing with the "to" on the eighth line from the top and ending with the word "or" on the ninth line from the top, which reads as follows:

"to join plaintiffs in the organization of said corporation, or"

We also desire to amend the first paragraph of the prayer of the complaint, commencing with the word "specifically" in the first line and ending with the word "he" in the third line, reading as follows: By striking out—

"specifically perform the contract of July 9, 1908, set out in the fifth paragraph of this complaint, or that he."

Those portions of the complaint have not been sustained by the proof and we desire to amend in order to conform to the proof.

Mr. GANTY.—I object to any such amendments being granted on account of the variance in the proof. The variance is so great that it is fatal to the cause of these plaintiffs—they want to amend practically their entire complaint and prayer, and I [183—141] don't believe they are entitled to that amendment at this time.

By the COURT.—I understand the complaint can always be amended to conform to the proof, if there is

a variance; this variance does not go to the real substance or merits of this case, it goes more to a certain theory with regard to the rights flowing from the facts and the agreeemnts of the parties. With regard to this first agreement, made in 1907, about forming the Mystic Corporation, it seems as far as the testimony discloses now that that has been abandoned by the plaintiffs and so far as the allegation of refusing to deed or asking in the prayer that the defendant deed as specifically set forth, that merely goes to the remedy that would follow, whether it was asked in the prayer or not, that is, if the plaintiffs are the owners of an interest here, the defendant is bound to deed it, whether it is asked for or not; it is their right, he holds it, in trust for them, they are the equitable owners. I do not see that the defendant is prejudiced in the least by these amendments, it does not change the nature of the action, it does not surprise the defendant, it does not take away any rights he has to defend this case, and the leave to amend may be granted.

Defendant allowed an exception to the ruling.

Recess to one o'clock.

AFTERNOON SESSION.

Mr. GANTY.—I desire to recall Mr. Kraemer for further cross-examination.

**[Testimony of Charles Kraemer, for Plaintiffs
(Recalled—Cross-examination).]**

Mr. CHARLES KRAEMER, recalled for further cross-examination:

(By Mr. GANTY.)

Q. I hand you here a book and ask you to state what that is?

(Testimony of Charles Kraemer.)

A. The Cliff Mining Company cash-book and journal.

Q. You are the regular custodian of that, or have been? [184—142]

A. I have been, I am not at the present time.

Mr. GANTY.—They are admitted to be such, I believe?

Mr. DONOHOE.—Yes, we admit they are the books of the Cliff Mining Company.

Q. I hand you Plaintiffs' Exhibit "I" and ask you if you made that statement? A. Yes, sir, I did.

Q. I will ask you to turn to the journal of the Cliff Mining Company, if it is here—rather to the ledger instead of the journal— A. That is the ledger.

Q. Turn to the account headed Patent Expense on page 99. A. Yes, sir.

Q. State to the Court just what that account consists of.

A. That account consists of all the charges that were made in re the Gold Bluff Mining Company suit against the property of the Cliff Mining Company or the property the Cliff Mining Company leases.

Q. Does that include all of those charges?

A. All of the charges in so far as the survey is concerned.

Q. What other charges were there?

A. Well, the other charges against the owners were charges of Mr. Bunnell, the fees of Mr. Bunnell.

Q. It includes everything but the attorney's fees?

A. It includes everything but the attorney's fees.

Q. Now in this statement, Plaintiffs' Exhibit "I,"

(Testimony of Charles Kraemer.)

on the right hand side of the statement is an entry as follows: Survey \$40—I see the item runs clear across the page, under date of September 30, 1912, Voucher 1829, L. W. Storm, account of survey \$40—I will ask you if that item appears in this account, which is entitled patent expense? [185—143] A. It does.

Q. I will ask you to state how many more of the items contained in Plaintiffs' Exhibit "I" appear in that same account?

A. Well, they are all debited to the account—of course, there was a transfer of one lot of items of \$103.05 made from the account and the amount was charged to Mr. Ellis.

Q. When was that transfer made, on what date?

A. During the month of March, March 28th.

Q. What year? A. 1914.

Q. When is the first entry in that account?

A. In the patent expense account?

Q. Yes.

A. The entries in the ledger are all recopied from the monthly accounts in the journal and it would therefore be some time before September 30th.

Q. Some time prior to September 30th, in what year? A. 1912.

Q. And the last entry—

A. The last entry on the patent expense account on the debit side is March 31, 1914.

Q. That account, Mr. Kreamer, was practically a dead account carried there—it was just simply an account wherein was collected all these items?

A. Yes, sir.

(Testimony of Charles Kraemer.)

Q. The money paid out for these adverse proceedings by the Cliff Mining Company for all purposes, except the attorney's fees, were collected together in that account? A. Yes, sir.

Q. And charged directly to it as they were paid out on vouchers? A. Yes, sir. [186—144]

Q. When, if at all, was the apportionment made, or any apportionment made, of those expenses of the adverse suit, as between the owners of the lease, on what date, as shown by your books? A. March 28, 1914.

Q. And under your method of making these statements and the method in practice in this company of making the statements to the owners of this lease of their royalties and their accounts with the Cliff Mining Company, would these amounts, this charge of that portion of these expenses of the adverse suit as appearing in these books, have been made in any statement given to them prior to March 31, 1914?

A. No, I never made a statement, that is, made a royalty statement until there was a royalty due; if the mining and milling account was more than the product of the mine, why I never made a royalty statement until there was royalty due the owners of the property.

Q. Would it be possible then for you to run through several months without making any statement at all to the owners? A. Yes, sir.

Q. Did you, in fact, do so occasionally?

A. There were times when there wasn't any royalty for several months, for three or four months.

Q. This statement, Plaintiffs' Exhibit "I," con-

(Testimony of Charles Kraemer.)

taining these various items which were taken as you say from this patent expense account, was the first statement you made to the owners of the lease of those various items shown?

A. Yes, this is the first statement I remember making, dated April 1st, 1914.

Q. I hand you here Plaintiffs' Exhibit "K"—did you make out that statement?

A. No, sir, I did not. [187—145]

Q. Do you know who made it out?

A. I wouldn't say for sure—that was made out while I was gone into the Interior.

Q. You have already testified, I believe, that this statement, Plaintiffs' Exhibit "I," was the first statement made out of those items of patent expense?

A. Yes, the first statement that was rendered to the owners of the Cliff mine.

Therefore if this contains a statement showing that patent expense, it must have been made after exhibit "I"? A. Yes, it must have been.

Q. Who succeeded you in the office of the Steamship Company when you went into the Interior?

A. Mr. Millard took charge of the books while I was inside.

Q. Which Millard is that?

A. D. F. Millard, that is Frank Millard.

Q. Can you tell us from these books when the statement regarding the thousand dollar fee to Mr. Bunnell was first given to the owners of the lease?

A. Can I tell from the books?

Q. Yes.

(Testimony of Charles Kraemer.)

A. No, I could not tell when they made the statement out.

Q. You can tell when the entries were made, however. A. I can tell when the entries were made.

Q. Will you kindly tell the date of that entry?

A. The first entry made here is dated May 31, 1914.

Q. Did you make out any statement showing 10% of the cost of the Gold Bluff suit?

A. No, I did not, I was not here at the time that the statement was made.

Q. Can you tell to what entry in your books that refers? [188—146]

A. Yes, I could tell—the items are on the ledger.

Q. In this exhibit “K” state what that item 10% of cost of Gold Bluff suit refers to.

A. It refers to a voucher here, dated May 31st charged to Mr. Treat, \$33.33—that was a third of a payment due Mr. Bunnell.

Q. And how came the item to be \$100 on the statement?

A. I suppose that was just made out by the book-keeper showing the full amount.

Q. There had been an amount paid previous to that?

A. No, the next amount was paid on a later date, that is the two-thirds payment—Treat paid \$66.67 on June 3, 1914.

Q. So that according to those books and your knowledge of these statements, the two items would be included—the \$100 included the two payments, one made June 3, 1914?

(Testimony of Charles Kraemer.)

A. One was made May 31st and the other July 3, 1914—it is July, not June.

Q. July 3, 1914? A. July 3, 1914.

Q. You stated I believe that the company ceased to operate in August, did you not?

A. Well, that is the time I understood they were to turn over the property, the Cliff Mining Company—I wasn't here at the time they issued those orders, however.

Q. You were not here when they closed down?

A. No, I was not here.

Q. You might show from the books the last item of labor paid, the date of it, labor, that is for mining?

Mr. DONOHOE.—I will state to save time we will admit that they closed down at any time that counsel may desire to state, in July or August or whenever it was. [189—147]

By the COURT.—I don't see what bearing it has on this case, but if you think it is important, go ahead.

Mr. GANTY.—I think it has a bearing on this case and he can tell very easily.

The WITNESS.—The last item that was paid out for labor did you say?

Q. Yes.

A. Well, the last item that was paid out for labor, outside of Mrs. McDougall, the watchman, was on July tenth.

Q. I think you stated in your direct examination that you had a conversation with Mr. Ellis regarding this transfer of an interest from Mr. Smith to Mr.

(Testimony of Charles Kraemer.)

Archibald and you repeated a conversation that you had with Mr. Ellis concerning this transfer? You remember that, do you not? A. Yes, sir.

Q. State whether or not you had not, previous to that conversation, had several others with him regarding this same matter.

A. Well, I couldn't remember anything before that, it may be that I had some afterwards, in a joshing way, that is, just meeting him on the street and Red and I were both friendly and I would josh him about having partners in the property.

Q. As a matter of fact, between yourself and Ellis, it was rather in the nature of a joke, the nature of a suggestion?

A. The first conversation that came up, that I stated yesterday, it was really that way, yes, sir.

Q. It was a matter of a joke, you brought it out, and it was so treated by you, was it?

A. Well, in an offhand way like two freinds will josh at times; at the same time I may have felt that there was something to it, but I couldn't say.

Q. It was said in a jocular way, in a jocular manner? A. Yes, sir. [190—148]

Mr. GANTY.—That will be all.

Witness excused.

Plaintiffs rest.

Mr. GANTY.—At this time we move for a dismissal of this action for the failure on the part of the plaintiffs to offer evidence to susutain their pleadings.

The motion was by the Court denied and defendant allowed an exception to the ruling.

Defense.**[Testimony of H. E. Ellis, on His Own Behalf.]**

H. E. ELLIS, the defendant, called and sworn as a witness in his own behalf, testified as follows.

Direct Examination by Mr. GANTY.

Q. What is your name? A. H. E. Ellis.

Q. You are the defendant in this action are you?

A. Yes, sir.

Q. You live in Valdez? A. Yes, sir.

Q. How long have you resided there?

A. It is about 1901, when I made it my postoffice address.

Q. Are you acquainted with Mr. George C. Treat?

A. Yes, sir.

Q. With Mr. Edmund Smith. A. Yes, sir.

Q. And with Mr. Logan Archibald?

A. Yes, sir.

Q. They are the plaintiffs in this action, are they?

A. Yes, sir. [191—149]

Q. Are you acquainted with Mr. A. J. Crane?

A. Yes, I met him here in Valdez.

Q. You are the owner of the mining property which in these proceedings has been designated as the Cliff mine. I believe?

Mr. RITCHIE.—We object to that as calling for a conclusion of the witness.

Q. You were the owner of such property at least?

A. Yes, sir.

Q. And in order not to call for a conclusion, I will simply leave it in that light—you were the owner of

(Testimony of H. E. Ellis.)

such property on the 15th day of May, 1907?

A. Yes, sir, I was.

Q. On or about that day you entered into an agreement with Mr. Smith and Mr. Treat concerning this property? A. I did.

Q. I will ask you if that is the agreement shown there? (Handing witness paper.)

A. Yes, sir, that is the agreement.

Q. State the circumstances that are material to this case concerning this agreement and the circumstances that surround it?

In March, 1907, I began work on the property with Mr. Dean, driving a tunnel *above* 60 or 70 feet above sea level and we worked there in the neighborhood of two months, from the first of March, driving about, in the neighborhood of 50 ft., and most of it was open cut, probably thirty foot underground working, in which we found some very good ore and got quite a little bit out of it. Some time later I approached Mr. Treat with the idea of getting money to make a shipment of this ore, to have it tested, and he mentioned Mr. Smith as being interested in mining in the States and the Black Hills region, I believe it [192—150] was and if he would go into the proposition with them, they would furnish the money to go ahead and ship this ore. He took it up with Mr. Smith and it was agreeable and they agreed to put up \$500 for covering the expenses of getting this ore ready and shipping it to the Selby smelter; that is the time this agreement was drawn up, to cover that understanding.

(Testimony of H. E. Ellis.)

Q. You received the \$500 at that time?

A. I received the \$500 at that time and employed part of it for that purpose.

Q. State what you did toward carrying the contract out, what ore, if any, was shipped to your knowledge and all the circumstances connected with it and the returns.

A. We took what ore was already on the dump and got out a little more, which we thought at the time would be more than five tons as agreed upon, but after we had brought it up and got an estimate on the weights of it, we found that the sacks did not hold near as much as we had supposed they would, and it made quite a little bit less than five tons. I turned the ore over—brought it up in a small launch I had at that time, and turned it over to Mr. Smith at the Valdez dock. He was supposed to look after the shipping of it and the collection of the money. He got the returns some time after, which were anything but satisfactory—I believe the amount was, the net returns, were something like \$136. He showed me the statement from the Selby smelter at that time or shortly afterward and this is my remembrance of it.

Q. Did you ever receive any money on account of the proceeds of this ore?

A. No, there was no dividends declared on the proposition, for the reason that it did not cover the original amount invested, to say nothing of their one-quarter interest to be allowed [193—151] for furnishing the money.

(Testimony of H. E. Ellis.)

Q. So that you never made any claim for any returns on that?

A. Never made any claims at all for the return of any part of the money.

Q. You subsequently entered into a further agreement, did you not, with Mr. Treat and Mr. Smith, concerning this property? A. I did.

Q. I will ask you if this is a copy of that agreement? (Handing witness paper.)

A. Yes, sir, that is a copy of it.

Q. Was this signed by all of you at that time?

A. It was.

Q. Those are your signatures to it?

A. Yes, sir.

Q. Signed by Mr. Treat and Mr. Smith and yourself? A. Yes, sir.

Q. In your presence? A. In my presence.

Q. State, Mr. Ellis, the circumstances connected with this contract and its entering into between yourself and the other parties to it.

A. The contract of incorporation is it?

Q. It is Plaintiffs' Exhibit "D," which I handed you—Just state in your own words, the circumstances connected with it.

A. After several discussions we concluded that it would not be worth while to ship any more ore to the smelter, on account of the poor returns we had received from them, it would not much more than cover the cost of sending it out and Mr. Treat and Mr. Smith gave me to understand that they would get persons interested [194—152] in the property, in

(Testimony of H. E. Ellis.)

a company to be formed here in town, that would furnish enough money to put in a small plant for the extraction of the gold from the ores and they further stated that if they could not get the parties interested in this project, why they were able and willing to go ahead with it and furnish the money, that is, if necessary, but that they would try to get parties here in town interested—I know they spoke of Mr. Ed Woods as one and Mr. Lathrop—they said they were both public-spirited men and would probably take a chance on a proposition of that kind; it wasn't only a chance to make something for themselves, but it would tend to develop this section of the country and they were all heavily interested and they thought that they and a number of others here in town would be only too glad to help the matter through, so we drew up this contract with that idea.

Q. Is that all that occurred prior to the drawing up of the contract as far as you can remember?

A. Yes, sir.

Q. You might state what was done by you towards the carrying out of this contract and the circumstances connected with the carrying out of this contract,

A. We had a number of discussions on the subject.

Q. For the purpose of refreshing your memory, I will ask you if this was the paper that was entered into, Plaintiff's Exhibit "B," in compliance with the terms of this agreement you have just referred to? (Hands witness paper.) A. No, that is not.

Q. I mean Defendant's Exhibit #2.

(Testimony of H. E. Ellis.)

A. Yes, the articles of incorporation were drawn up in accordance with that agreement at a later date.
[195—153]

Q. I wish you would state to the Court your recollection of these matters.

A. We agreed to incorporate this Mystic group of claims, as we called it and sell enough of the treasury stock to pay for the installation of the plant and work it as a corporation.

Q. These papers were drawn up in pursuance of that agreement?

A. The articles of incorporation were drawn up and were signed by the parties interested, at that time.

Q. State just what occurred at the time of signing these articles of incorporation and where were they signed?

A. They were signed in Mr. Smith's office.

Q. Did you sign any other document at that time?

A. I also signed an option agreement to transfer the property to this company.

Q. Who signed that?

A. I signed that myself, the other parties not being interested in the property.

Q. That is this agreement marked Defendant's Exhibit #7, that is a copy of it? A. Yes, sir.

Q. State what was done with those papers.

A. The articles of incorporation were left with Mr. Smith in his office to be filed with the clerk of the court and one sent to Juneau in the regular routine.

(Testimony of H. E. Ellis.)

Q. Now, state what was done further by the parties towards carrying out this agreement, proceed with your own story.

A. Mr. Treat and Mr. Smith saw a number of parties and they failed to get much encouragement or as much encouragement as they expected, and it was so reported to me afterward, that they had been unable to get these parties *that* had mentioned to take any [196—154] interest in it at all. After some little time, why, we came to the conclusion that it would be impossible here in Valdez to get the money.

Q. State what was done then by the parties.

A. We afterwards agreed to abandon this plan of selling the stock as they had not been able to sell any here in town, among the parties they had approached and to let the thing fall back on to this first agreement which we made in regard to this lien on the property. The first agreement we signed was regarded by us as a mortgage on the property and they let it drop back to that status.

Q. About how long was that afterwards?

A. This was some months afterwards, probably in the fall of 1908.

Q. What was done after that by the parties toward developing these mining claims?

A. Mr. Treat and Mr. Smith both spoke to me in regard to this—they would like very much if I could do something to repay them the money I owed them, and I said there wasn't much chance of my doing anything at the time, getting hold of that

(Testimony of H. E. Ellis.)

much money just at that time, and they wanted to know if I couldn't dispose of this property for the purpose, to repay them—they were very much in need of the money and would like to have it at that time. Times were pretty hard here at that time in Valdez and they were in need of ready money.

Q. You subsequently made another agreement in which the plaintiffs were interested, did you, concerning this property?

A. Afterwards, the next year, we gave an option to lease to Mr. Crane.

Q. This is the option, is it not? (Handing witness paper.)

A. Yes, sir, that is the option. [197—155]

Q. It is marked Plaintiff's Exhibit "B"?

A. Yes, sir.

Q. Now, just continue your story and bring in this option, as the facts occurred?

A. A gentleman that had some claims out here near the glacier tried to work them at that time and brought up an outfit from below to put on this property out here on the glacier.

Q. Mr. Haines?

A. Yes, Mr. Haines; and they turned out to be of no apparent value. Mr. Dean had been working me down at the Cliff mine—he was the man that helped me do this work in March or April, 1907, and he had some specimens of this work and he showed it to Mr. Rider, who was working for this outfit—I don't remember the name of the company that had the Haines property.

(Testimony of H. E. Ellis.)

Mr. RITCHIE.—Is that the Rider that is here now?

A. Yes, sir—he was working for him at that time—he gave me an introduction to Mr. Rider.

By the COURT.—Who gave you an introduction to Mr. Rider?

A. Mr. Harry Dean. He showed him this rock and Mr. Rider was very much interested in the specimens of the rock on account of their value and the description Mr. Dean had given him of the property. Mr. Dean was highly impressed with it and he came to me and asked whether I couldn't do something with this company, that they had made a failure of the proposition out here on the glacier and why couldn't I take it up with them, and I told him that my idea of the proposition was that they had just bought a gold brick and it would be very hard to sell them twenty dollar gold pieces then for any amount of money. Anyhow, Mr. Rider gave me an introduction to Mr. Crane and spoke to Mr. Crane on the subject, brought the matter to his attention, [198—156—157] and just about that time Mr. Mil-lard met me on the street one day and said he had heard a great deal about my having a prospect down on the Bay that showed good values in gold and asked what I expected to do with it. I told him I wanted to get some one interested in it that would put up machinery on the property and get it producing, and he asked me if I would be willing to show him, if I had any samples of this ore. I told him I had, down in my shack on the reservation,

(Testimony of H. E. Ellis.)

and he asked if I would show them to him, and I said I would be glad to show them to anybody that was interested. He went down to the shack and I had a thousand or fifteen hundred pounds of rock there on the floor and he examined it, large chunks of it, and we sat down there and broke rock for I expect half an hour or more. He thought well of the samples and wanted to know what I would do about it, and I made him a proposition of a quarter interest if he would put up money enough to put the machinery on the ground and go ahead and develop the property—I thought it would pay for its own development. He tried first to buy the property, or to get a controlling interest, buy a controlling interest. I refused that, and stipulated that this money was to be expended under me, in accordance with my idea of it—I didn't want the money, a few thousand dollars, wasted; so he finally agreed that he would put up this money. He said, "Red, if this proposition is as good as you say it is, if it is one-tenth as good as you say it is, I will put up \$5,000 of my own money and friends' back in the States—I will agree to get them to put up \$5,000 more to carry this thing through." And he says, "I want to shake hands with you," which he did at that time, and he says, "when can we go down to see the property?" and I said, "We will go down at your convenience; I am not [199—158] doing a thing now and will be glad to go with you at any time," and I believe he said, "I will go down the next day," at any rate, in a short time, probably the next day, I think it

(Testimony of H. E. Ellis.)

was, we went down and Mr. Crane asked me, I think the same evening, if he could go and see the property, and I told him no, that Mr. Millard was going down; I had a deal on with Mr. Millard and I didn't care to take anybody outside of that down excepting the ones that would be interested; I said if Mr. Millard was agreeable, of course it was all right with me, and he went and saw Mr. Millard and got permission to go down with him and he took Mr. Rider with him at the time and Mr. Haines, also, and it seems to me that Mr. Millard had some man with him, but I am not positive of that. So we went down the next day and examined the property and Mr. Millard liked it very much, and when we were sitting there, there was a showing above this upper tunnel where I had done a little work, some work, that spring, probably forty or fifty feet above, higher up the hill, and a little distance from it—we were sitting there, it was exceptionally rich rock; you could see gold all through it; we were sitting there looking at this fine specimen and he said, "Red, why didn't you tell me what this was like?" and I said, "I thought I told you as near as I could, not to exaggerate it," and he said, "You didn't exaggerate it, it is a hundred times better than you said it was." Then we returned; he took samples and we returned to Valdez and he asked me when he could see me on the subject, and I said, "At your own convenience." He said, "Well, will you come to my room after I have had some of these samples run?" and I said, "Yes," and he named the next

(Testimony of H. E. Ellis.)

afternoon, I think it was, at two o'clock; so I left him. This was probably in the middle of [200—159] the afternoon, and I went down to Mr. Smith's office, and Mr. Treat was there at the time, I believe, and I asked him what their idea would be as to a cash settlement of this debt against the property, and they said that they wouldn't—I told them that Crane—they knew, of course—everybody in town knew—that I had some deal on with Crane in regard to the property, but they said they wouldn't consider a cash settlement at all—that they really considered Smith put this in, that they really considered this money, after running so long, as something in the nature of a grubstake, that they really ought to have an interest in the property itself, and I came down flatfooted, and I said, "Not by a dam sight"; they said they couldn't think of accepting a money settlement, and I said, "Well, we will drop the thing right now. I won't go ahead with this proposition with Crane," and I walked out of the office and later, I don't know, but I don't believe I went back to Mr. Crane's office, to his room in the hotel, because I didn't think it was worth while, but Mr. Treat evidently met Mr. Crane later and Mr. Treat hunted me up and asked me to go back and see Crane and have another talk with Crane, and he said, "Now, for myself," he says, "I want to see this thing *to* through," and he says, "I would be willing to accept an interest in the royalty, in this leasing proposition; I would be willing to accept an interest in the royalty and I think that Mr. Smith would,

(Testimony of H. E. Ellis.)

too; we talked it over somewhat after you left and I believe he would be willing to do something that way," and I said, "How much royalty would you want?" and he said he thought they ought to have 20%, and I said, "You fellows want the earth for a measly \$500, don't you," and I said, "This proposition is going to be a valuable property and produce a good deal of money, much [201—160] more than would repay you for the use of your \$500, surely not less than that," and he said, "for my part I would be willing to take 15% or ten per cent," he said, "anything to insure the return of the money I have put into it."

Mr. RITCHIE.—Who said that?

A. Mr. Treat, we were talking on the street as we walked downtown. "I would be willing to accept anything reasonable that would insure the return of my money"; he says, "I am a heavy property holder and if we can get some mines started in this neighborhood it will be a great improvement to the town," and he says, "Mr. Smith feels the same way, if we can only get this thing started up," and I said, "Well, under those circumstances I will go in and see Mr. Crane and have another, a further talk, with him," which I did, and we practically arranged our agreement as outlined in this option to lease. *The* Mr. Crane, he was very busy, it was just before he was leaving, I think the same afternoon—this was during the afternoon and he was very busy getting off some letters or report or something, and he said, could I see him later; I said I could. When

(Testimony of H. E. Ellis.)

Mr. Treat left me, he returned to Mr. Smith's office to see if they couldn't come to some conclusion in regard to this proposition on a royalty basis and after leaving Mr. Crane I met Mr. Smith on the street—I mean Mr. Treat—and he said, “I talked it over with Mr. Smith and we agreed that we would accept of part of the royalty in payment of this”—he says, “Mr. Smith thought you had better write it down, just in the nature of a letter,” he said, “to that effect,” and he handed it to me.

Q. Have you got it here?

A. I have. [202—161]

Q. I will ask you if this is the letter that you say was handed to you by Mr. Treat at that time?

A. That was handed to me by Mr. Treat on McKinley Street.

Q. What statement did he make at the time that was handed to you? Give the exact conversation that occurred between you and Mr. Treat at the time he handed you this letter.

Mr. GANTY.—I want to offer this letter in evidence.

It is admitted, without objection, marked Defendant's Exhibit “9,” and reads as follows:

Defendant's Exhibit No. 9 [Letter, June 5, 1909, Geo.

C. Treat et al. to H. E. Ellis].

Valdez, Alaska, June 5th, 1909.

Mr. H. E. Ellis,
City.

Dear Sir:

In answer to your inquiry as to what we would

(Testimony of H. E. Ellis.)

take or accept for our fifth interest in the Gold Lode Mining Claims, located by you on North side of Valdez Bay, will say:

That we will accept fifteen per cent net of royalty on lease of property provided the contract of lease is satisfactory or we will accept twelve thousand five hundred dollars in cash net for our interest in said property.

Very truly yours,

GEO. C. TREAT.

EDMUND SMITH.

By the COURT.—This letter is dated June 5, 1909—that is the date this agreement was entered into with Mr. Crane? A. Yes, sir.

(By Mr. GANTY.)

Q. (Continued.) Now, you may state the conversation that occurred at the time this letter was handed to you by Mr. Treat.

A. Mr. Treat handed me the letter and he said, "We drew this up—Mr. Smith thought it would be best to embody this in the form of a letter, which we both signed and he said we decided to accept 15% of the royalty." He handed me the letter and walked on. I was on my way to see Mr. Crane at this time; in fact, I went back to see Mr. Crane at this time. [203—162]

Q. What did you do with Mr. Crane?

A. I came to a complete understanding then with Mr. Crane. First, I would say, I was surprised that they wished so much—I was in hopes all the time that I might be able in some way to pay off this

(Testimony of H. E. Ellis.)

money indebtedness and retain the full interest in all the claims and the royalties and have no outsiders at all and I started to walk away and was rather vexed when I got thinking over the subject. Mr. Treat had been very good to me and offered me money and loaned me money and never pressed me for the payment of it, and when he said 15% or 10% I had thought at the time that ten per cent would be the basis of what they would ask of the royalty, and as I say, I started to walk on and I got thinking, well, an extra 5% wouldn't be so great a lot, that they really had earned that much anyway and I would be only too glad to divide up, if there was anything an extra 5% wouldn't amount to anything anyway and I went on then up to Mr. Crane and we concluded our agreement and from there I went down to Mr. Smith's office and told him what we had done. Mr. Crane said, "Now, I am very busy and have a lot of papers to write and some packing to do; if you will see Mr. Smith and get him to draw up this option on the lines of our talk, why it will save us a lot of time"; he says, "I really haven't time to go down to see him myself, and you make some date when I can see him, and we can call in there to-night and sign this contract." I went down to Mr. Smith and explained the matter to him and he drew up this option and set, I think it was, 7:30 o'clock in the evening—this was probably half past four or five o'clock—he set, probably, I think about seven or half-past seven in the evening for us to come in and sign it, and he said, "If you will come in a little

(Testimony of H. E. Ellis.)

earlier, why we can look this thing over and [204—163] talk it over and see that everything is as you would like to have it and if there is any objections or corrections to make, why, we can make them before Mr. Crane comes in. Any suggestions you have we can take up,” and I called in there before the time, I think about half an hour ahead of the time, that Mr. Crane was to arrive and we looked it over and I did have a suggestion to make and we talked it over and when Mr. Crane came we discussed it with him and inserted it, inserted the correction in the lease.

Q. Do you remember as to what part of the lease the correction was made?

A. No, I can't think right now what it was.

Q. You remember making some correction to the lease?

A. Yes, I do, but I don't remember exactly what it was.

Q. I will ask you if that was the correction that was made at the time you testified about? (Handing witness Plaintiff's Ex. "B.")

A. Yes, that was the one; it was in regard to the settlement that was to be made—there was no mention of the time when this settlement was to be made and I thought we had better have something put in regard to that and Mr. Crane was perfectly willing that it should be written in.

By the COURT.—Do you consider that important? Do you want to introduce this? It says, settlement to be made each month, in writing,—do you

(Testimony of H. E. Ellis.)

desire to introduce this for the purpose of showing that?

Mr. GANTY.—Yes, sir.

By the COURT.—It is set out in the copy just the same, but that shows it to be in writing.

Q. Who else was there at that time?

A. At the time we discussed this before? [205—164]

Q. Yes.

A. There was no one but Mr. Treat and Mr. Smith; and among other things that they spoke of at the time when we entered into this contract, a day before, was the idea of Mr. Treat acting as my attorney in matters pertaining to this.

Q. Mr. Treat, you say?

A. Mr. Smith, I mean; as he was a lawyer, he would act as my attorney and that was one of the considerations of this interest in the royalty being *vien* him, that he should act as my attorney in the drawing up of all papers and seeing that everything was legally done; he said, “There was always more or less difficulty between the owners and leasing companies, there would be difficulties coming up all the time and it was very good for some one, to have some one, to take care of your side of the proposition.”

Q. And that was before Crane came in, was it, during the negotiations?

A. Yes, that was before Crane came in and at that time we also were talking over the status of the contracts we had entered into before and they turned over to me the articles of incorporation and agree-

(Testimony of H. E. Ellis.)

ment that they had made.

Q. This one you mean? Is this the articles of incorporation that you state was turned over to you at that time? (Handing witness Defendant's Exhibit #1.) A. Yes, sir.

Q. State what you did at that time.

A. I asked about these articles of incorporation and what was to be done with them, since we would have no further use for them and they said, "Well, you can do as you please with them," and they got them out and handed them to me and Mr. Smith had one of [206—165] them in his desk, I believe, that he handed to me and he said, "You can do with it what you please, put them in the stove if you wish to." "Well," I said, "I believe I will save that as a souvenir; I will just tear off the signature and put that in the stove and save the rest as a souvenir."

Q. Is this the one you are testifying to as having torn off the signature? (Handing witness paper.)

A. It probably is—yes, that was probably the one I tore off at that time.

Q. What else was done at that time?

A. He got the others—I think he had the others in his safe,—at any rate he got them and brought them in, the copies, and was going to hand them to me; he sat down at his desk and I speaking to him said, "Wouldn't it be a good idea to run a pen through these other names?" and he said, "Yes, if you wish to," and proceeded to run his pen through the other names, the other signatures, at his desk.

Q. I will ask you when this instrument, exhibit

(Testimony of H. E. Ellis.)

#7, appeared in the transaction?

A. This was gotten up just before, probably a day or so, or about the time that the articles of incorporation were drawn up.

Q. Were these returned to you at the same time as the articles of incorporation?

A. I believe they were.

Q. And you have had them in your possession probably ever since?

A. I have had them in my possession ever since.

Q. You may continue.

A. We talked this matter over and these papers were returned to me and Mr. Treat came in about fifteen minutes after I did and after we discussed this and talked of this correction, we waited for Mr. Crane to come in and sign the papers and we signed [207—166] the papers and each kept a copy of this contract or option to lease.

Q. State what transaction occurred, if any, subsequent to that option of Mr. Crane's being signed, the lease?

A. The next thing of importance, I believe, was making out this lease to Millard.

Q. State the circumstances in connection with that?

A. As I understood it, Mr. Lathrop got very much interested in the property on Mr. Millard's report and when Mr. Crane found he couldn't carry out his agreement, Mr. Lathrop kept track of it, I believe, or kept in communication with him—when he found he couldn't go through with it he sent Mr. Millard down to try to secure this option, which he did, and

(Testimony of H. E. Ellis.)

they asked me to fulfill the agreement.

Q. Give the facts that occurred at the time of the signing of this agreement with Millard, this lease, as between yourself and any of the parties to the contract?

A. This paper was drawn up by Mr. Smith; I came in and read it over some little time before Mr. Crane appeared to sign it, before the time set for him to come in and sign the paper—I wanted a chance to read it over and discuss the matter, thought there might be some corrections to make.

Q. You mean Mr. Millard instead of Mr. Crane, don't you?

A. Yes, Mr. Millard was to come in and sign this lease and I came in early and read over the lease—Mr. Smith had already received a copy before I got there, Mr. Treat, I mean—Mr. Smith had drawn it up in the office. I read over this lease and I objected at the time to the way the ownership was set forth there, as owners of certain parts, that they were represented as owners of part of the ground and I brought that question up at the [208—167] time, *objection* to it, and Mr. Smith said that he put it in that way as he thought they could better represent his and Mr. Treat's interest and that he could also better protect me in the matter as my attorney, and with that explanation I let it go—I didn't like the looks of it, but I thought it would be all right, because we had such a thorough understanding on the subject and also had this letter that they had written me—I thought that was sufficient, even though their spoken

(Testimony of H. E. Ellis.)

words would not hold, that that surely would, although I had no doubt as to their understanding of our agreement at any time and never have had since, until the time—

Q. State what that agreement was?

A. That they were to receive in full payment for all the money I owed them, receive fifteen per cent of the net royalties in the lease to be given Mr. Crane.

Q. That was the entire understanding, was it?

A. That was the understanding between us at the time and was my understanding up to quite recently; the subject was never discussed between us afterward, because I never thought that there was any subject to discuss in that line—I understood it thoroughly and I supposed they did and they have never brought it up.

Q. That is the extent of your conversation practically with Mr. Smith on that question of the description of the owners?

A. That is, yes, sir, that was practically all as near as I can remember, that was the entire conversation. He described himself and Treat as owners, so they could better protect me and themselves in the lease as against the company.

Q. State if about that time you had any conversation with Mr. Treat regarding the cancellation of this mortgage.

A. The mortgage on the property I understood was canceled with [209—168] return of these articles of incorporation and our agreement—I understood that was a cancellation of the mortgage on the prop-

(Testimony of H. E. Ellis.)

erty itself and at the time Mr. Treat agreed to cancel—I asked him in regard to the mortgage on the other property, the lot on McKinley Street, and he said, “I will see that the mortgage is satisfied,” and later I asked Mr. Smith if it was; I was in the office there with Mr. Smith, and he said he didn’t know, but he said he supposed it had, but at any rate they would see that it was.

Q. Did you have any further conversation on that subject with him?

A. Some time later I was told, some time after, by some parties, “I see you have a mortgage on this lot on McKinley Street”; I said, “No, that has been satisfied for some time”; he said, “No, I was looking over the book at the recorder’s office a few days since and I found it was still of record.” I made it a point, then, of seeing Mr. Treat in regard to it, and he gave me rather an odd answer I thought at the time, but it was perfectly satisfactory; he said—I told him that I understood he was to cancel that mortgage—he said, “Well, I neglected to do it,” but he says, “The lease has never produced anything, we never got any returns from this interest on the lease”; he said he would look after it, though, later, and I let it drop at that.

Q. What time was that in the period of the lease—which lease?

A. The lease to Millard, and that was some time after they had taken possession down there and started work, I think in the fall of 1909—they began working in August.

(Testimony of H. E. Ellis.)

Q. When did they first pay a royalty after that?

A. I think it was the following April, next spring at any rate.

Q. Do you know how much royalties you received from that lease? A. No, I do not. [210—169]

Q. Can you give an estimate?

A. No, I could not.

Q. Did you ever figure out how much royalty Mr. Treat received at any time?

A. I did glance over my statements at one time and I think it was something like $\frac{3}{4}$ I got figuring it from the statements; I didn't have them all, but from the statements I had I think it was something like seven or eight thousand dollars.

By the COURT.—You each know what the other received, but not what you received.

The WITNESS.—Mine was very badly mixed up,—I didn't go to the trouble of looking it up, but I was interested in knowing whether they had received enough to compensate them for the money.

Q. Were you ever notified by Mr. Archibald that he had acquired an interest in this property?

A. I never was.

Q. Were you ever notified by Mr. Smith that he had sold Mr. Archibald an interest in the property?

A. I never was.

Q. You heard some evidence given here regarding some amended location notices—you might state the circumstances surrounding that episode as you know them to be.

(Testimony of H. E. Ellis.)

A. In the summer of 1910, I believe it was, the matter was brought up of having a survey made of the claims; when it was brought up first it was discussed, and I thought that the property should be patented, if possible, as soon as we could, and it was taken up by Mr. Smith with the company to see if they would not have a patent survey made and application—see if they wouldn't go ahead to get the ground patented, so that there would not be any trouble with other locators; and we came to [211—170] an agreement that they would go ahead with this and the money was to be taken out of the royalties—the company thought it would be a protection for themselves and for the lessors as well—so they employed Mr. Storm to go ahead and make this survey, and, in looking over the ground, we found that the claims, some of the stakes, were not where they should be—the claims were too wide at one end, that was the principal change and that they should be drawn in quite a little bit and it was suggested that they make amended location notices and at the time of employing Mr. Storm, that was one of the things he was asked to *go* and agreed to do, was to make the survey and make out the amended notice and put them on the ground on the new stakes—he was going to put in new stakes, larger, and different wood from the ones we had in; most of them were large alders that had been put in originally and he was to use spruce, square timbers, when he made his survey.

(Testimony of H. E. Ellis.)

Q. So he was to put these notices on the ground?

A. I thought for quite a while that he had put them on, but I never had seen any of them on the ground, so I came to the conclusion that he did not do it.

Q. Was it understood or stated whose names were to be on these notices?

A. It was understood by me that my own name was to be on, that there was to be no change made in the location excepting just to bring in and get the surveyor's accurate description of the boundaries of the ground, and that the ground was still in my name, as I had every reason to suppose it would continue to be.

Q. Did you ever see these amended location notices? A. I don't remember ever seeing them.

Q. You have been absent from Valdez for some time, have you? [212—171]

A. From December, 1913, to May, the latter part of May, 1915.

Q. Who acted as your agent while you were away? A. My brother, Mr. Will Ellis.

Q. What powers did you delegate to Will Ellis?

A. The same powers I would have if I had been in regard to all my mining claims—left him in full charge of the conduct of all my business.

Mr. RITCHIE.—If there is a written power of attorney, I would like to see it.

The WITNESS.—There was no written power of attorney—I took him into the bank and told them

(Testimony of H. E. Ellis.)

he would sign checks in my name, and also took him into the Cliff Mining Company's office, and told them that he would receipt for me for all royalties and that they were to be turned over to him and I asked them—"Shall I make out some written notice of that kind," and they said—Mr. Kraemer was there at the time—and he said, "No, it will not be necessary, your word, your statement, will be sufficient."

Q. Had you told your brother at that time everything in connection with the condition of your affairs here?

A. Practically everything, especially in regard to the Cliff Mining Company and other mining claims.

Q. You believe he was thoroughly familiar with all the facts?

A. I thought he was—I believe he was.

Q. You appeared as plaintiff in the adverse suit entitled N. E. Ellis against the Gold Bluff Mining Company brought in this court? A. Yes, sir.

Q. Did you ever have any conversations or other communications with Mr. Treat or Mr. Smith regarding that suit?

A. Mr. Treat spoke to me of the matter; I met him on the street one day and he spoke of it; Mr. Smith was in the States, and some time after the thing had gotten pretty well along, I think [213—172] Mr. Bunnell was working on the papers, I received a letter from Mr. Smith stating that he would be glad to make out the papers, but that is as far as

(Testimony of H. E. Ellis.)

it went; there was no further communication from Mr. Smith, and I don't remember just what Mr. Treat said in regard to the matter; it is of no importance.

Q. Did Mr. Treat or Mr. Smith ever make any offer to appear as coplaintiffs with you in that case?

A. None whatever.

Q. Had they any right to do so?

A. None, not the least.

Mr. GANTY.—I will offer the files in Number 607, H. E. Ellis vs. Gold Bluff Mining Company. They are part of the court records.

By the COURT.—You will have to substitute copies if they are necessary to be made part of the record.

Mr. GANTY.—I will have the copies made, if need. The above file #607 of this Court, is marked Defendant's Exhibit #10 and admitted in evidence.

[Stipulation re Defendant's Exhibit No. 10.]

It is stipulated by counsel for the parties respectively that in lieu of Defendant's Exhibit #10, consisting of files in case No. 607, the following statement of facts may be substituted and incorporated in the Bill of Exceptions, to wit;

First. That said cause was regularly brought before the District Court for the Territory of Alaska, Third Division, on complaint filed February 22, 1913.

Second. That in said cause H. E. Ellis was the sole plaintiff and the Gold Bluff Mining Co. the sole

defendant, and no appearance was made by any other person. The issues in the cause at bar were in no way involved, directly or indirectly.

Third. That in the complaint in said cause No. 607, the plaintiff therein, H. E. Ellis, alleged himself to be the lawful owner and entitled to the possession of the Mystic No. 1 and No. 2, [214—173] Mystery No. 3 and Parallel No. 2 lode mining claims, which said claims are in controversy herein. Said Gold Bluff Mining Co. claimed part of the ground included in the above-named claims and had applied for patent for said together with other lands included in its claims. H. E. Ellis for himself alone had filed an adverse claim, and brought suit to determine right of possession.

Fourth. The final decree, entered in said cause Nov. 17, 1913, declared said H. E. Ellis to be the owner and entitled to the possession of a part of the ground in dispute with the Gold Bluff Mining Co., describing the same by metes and bounds, and decreed the remainder of the disputed ground to the Gold Bluff Mining Co., each party relinquishing to the other the land decreed to the other. This decree was entered pursuant to stipulation of the parties.

Q. Have any of these plaintiffs ever made any demand upon you for a deed or any other recognition, written or otherwise, of their interest, or any interest, *or any interest*, in this mining property, except that of the 15% royalty which was agreed upon in your lease to Mr. Crane and Millard?

(Testimony of H. E. Ellis.)

A. None, up to the time that this suit was begun; never at any time—there was never any suggestion of anything of that kind brought up.

Q. You have, however, received several letters from some of them, haven't you?

A. Yes, I received letters from Mr. Treat and Mr. Smith both.

Q. Did you ever consider any of those as demands or claims entitling them to the property?

Mr. RITCHIE.—We object to that. (Question withdrawn.) [215—173½]

Q. This attorney's fee in this Gold Bluff adverse suit just introduced here in evidence—State to the Court just the circumstances about that.

A. This matter of the Gold Bluff obtaining a patent came up; they advertised it, and it was brought to my notice and I went to the Cliff Mining Company's office to make a protest against allowing the thing to go through and Mr. Lathrop was in the office by himself, I believe, at that time, and he asked me to come in and sit down and we went into the back room and sat down and discussed the proposition and I told him I thought it was up to them to protect against all infringement, that was my understanding of the lease, and we had quite a conversation, and he said, well, he thought with me, that it was up to the company to protect me, to protect the ground, and we talked probably for half or three-quarters of an hour on very friendly terms, and he asked me if I had any particular lawyer I

(Testimony of H. E. Ellis.)

would like to employ, because he said if I didn't have, Mr. Bunnell was doing the company's business and his office was right across the street, that Mr. Bunnell had been doing considerable business for the company, and if I had no objections he would like, they would like to have him do the work. I said I had no objection whatever; "Well," he said, "if you will step across the street with me, I will instruct Mr. Bunnell to go ahead with the papers, to begin suit to stop this patent."

Q. When were you first apprised of the fact that you had been charged with the money in the shape of attorney's fees for this suit?

A. I don't remember; I think it was probably this summer; Mr. Bunnell told me that before I left in the fall of 1913, that he was looking to me for payment. I told him I had nothing [216—174] to do with it whatever, that I had not employed him, that Mr. Lathrop had given him instructions, and that the Cliff Mining Company were supposed to pay him.

Q. Did you ever ask these plaintiffs to pay a portion of the attorney's fee?

A. Never at all, at any time, because I didn't think they or I were required to pay them.

Mr. GANTY.—That is all.

Cross-examination by Mr. RITCHIE.

Q. When did you locate these claims?

A. In the summer of 1906.

Q. All of them?

(Testimony of H. E. Ellis.)

A. No, a part of them were located afterwards, in the summer of 1907 or '8, I couldn't say—I know it was after we had begun trying to do something with the ground.

Q. How many of these claims were located before you made the contract of May 15, 1907, with Treat and Smith?

A. I think there was just two at that time; we located these surrounding claims as a protection, because at that time no one believed that there were any values in the ground, in that section, there was no danger of bothering them.

Q. All except the first two were located just as you say, for protection?

A. No, it was valuable mineral ground—they showed good signs of carrying mineral there.

Q. You made the first discovery near the beach on the Mystic Number One, did you not?

A. Yes, sir; that is the first discovery, on the Mystic Number One, that I made there—the first discovery of the ground was made [217—175] on the Mystic Number Two.

Q. That was in the summer of 1906?

A. It was started in the summer of 1906.

Q. You located two claims during that summer?

A. Yes, sir.

Q. You say that you and Harry Dean went down about the first of March, 1907, to do some work, did you not?

A. I believe it was in the neighborhood, about the

(Testimony of H. E. Ellis.)

first few days of March somewhere, 1907.

Q. You had done no work the summer previous, had you?

A. No, very little—I had done a little, put in a few shots there.

Q. What a prospector does when he thinks he has something—to investigate a little further?

A. Yes, to investigate, and dug in a little on the vein.

Q. The first work, the first actual work you did of any consequence was when you and Harry Dean went down there in March, 1907?

A. Yes, that was the first work of any account.

Q. Did you do much work in March?

A. We worked the entire month, I believe.

Q. The snow was extremely deep then?

A. Yes, we dug down about, I think it was, twelve feet, sunk way down on the ground; we got down there and the wind blew and we stayed there the entire month.

Q. How much work had you completed by the 15th of May?

A. We had completed about, in the neighborhood probably of 45 feet, 45 or 50 feet of work, that is, open cut and tunnel work at that time.

Q. You first made a little hole, about the line of high tide and found you were too low and extreme high tide, extreme high water, would drive you out?

A. I did not. [218—176]

Q. There was a little work done about the line of high tide? A. Not to my knowledge.

(Testimony of H. E. Ellis.)

Q. There was a little work done there, wasn't there?

A. I don't know anything of it whatever.

Q. How high above high tide was this work that you and Harry Dean did?

A. Above extreme high tide, I think it is about 62 or 63 feet.

Q. That is where the lower Cliff tunnel afterwards ran in?

A. That they call the 100, the top of the mill.

Q. The one that run in just above the mill?

A. Yes, sir.

Q. Now, you say you did about 45 feet of work—most of it was open out work or stripping the vein?

A. No, there was, I think, it was 25 feet was under cover when we got in. The ground was slate and schist and rock; it was very rocky on the surface and when we got into it, we thought a couple of times we were under ground, but it caved down and we had to start again.

Q. Were you and Dean working there when you started in on the contract of May, 1907?

A. No, we quit some time before.

Q. What time did you quit?

A. Some time the latter part of April, I believe it was.

Q. Then you and Treat and Smith went down to look at the property shortly after that?

A. I don't know when we did go down.

Q. Did you go down before the 15th, before the

(Testimony of H. E. Ellis.)

contract was signed? A. I couldn't say.

Q. You are not sure whether you did or not?

A. Treat might have, I don't believe Smith did—I am not sure of [219—177] that, though—I made so many trips up and down there at different times.

Q. How did you pay Dean—out if this \$500 you got from Smith and Treat?

A. Part of it, I gave him a part of it; the agreement I had with Dean—along the first of March or the latter part of February I began getting my outfit ready to go down and do the work and he was stopping with me at my cabin and he said, "What are you going to do," and I said, "I am going down to do some work on my ground," and he said, "I want to get away from town; I can't keep from drinking in town and I want to get out, I will go down with you; I have been mining a good many years, thirty or thirty-five years," he said, "and I will help you and am willing to take a chance on it"; and I said, "Harry, I don't know that you will ever get anything out of it, I can't afford to hire you, and I don't want you to go there expecting to be paid for this and not be able to pay it." He said, well, he was willing to take a chance, anything that had that kind of rock in he was willing to take a chance on it, and if I ever sold the ground and was able, I could pay him, otherwise not; he would put that much in anyway; so later I paid him a part, what I could, when we came back up to town, and then later

(Testimony of H. E. Ellis.)

on, after I got this money from Mr. Treat and Mr. Smith, he asked me one day if I could let him have a little money; I was starting to get some ore sacks, I think, and he happened to be with me, and he saw I had some money and wanted to know if he could get a little, said he needed some, I think he intended to leave town, and I paid him a part of this money I owed him.

Q. Did you pay Dean some money?

A. Yes, sir.

Q. How much, do you remember? [220—178]

A. I don't remember, no—I gave him four dollars a day.

Q. That was the agreement, he was to have four dollars a day and board?

A. That was the agreement we came to afterwards—there was no set sum at the time he came down.

Q. Most of the money was paid out of this money you got from Mr. Treat and Mr. Smith?

A. I couldn't say—it was quite a little bit I paid before.

Q. And when you went down there, you got grub and outfit on credit and paid that out the five hundred dollars? A. Not altogether.

Q. Now, in the summer of 1907, there was nothing more done?

A. Yes, there was considerable work done that summer—we worked just above high tide, about where the lower tunnel is at present.

(Testimony of H. E. Ellis.)

Q. This ore that you sent to the Selby smelter, was that taken out by yourself and Harry Dean?

A. Most of it was taken out at that time, yes, sir, by us.

Q. You afterwards went back and got a little more?

A. Yes, from the showing further up the hill, further up on the hill.

Q. In a different place?

A. Yes, probably forty or fifty feet from there.

Q. On the same ledge?

A. The same vein, but a little further up.

Q. About that time, did you bring that ore to Valdez and turn it over to Mr. Smith on the dock?

A. Shortly after we signed this agreement.

Q. Around the first of June then?

A. I couldn't say just what it was—we got some sacks, I don't remember just when it was.

Q. There was nothing further done between yourself on the one [221—179] side, and Treat and Smith on the other, aside from occasional conversations, until you entered into the contract in July, 1908, to incorporate a company to develop this property, was there?

A. That is all I can think of now.

Q. There was nothing in the way of a contract—everything stood as they had when you got returns from the Selby Smelter? A. I think they did.

Q. Now, you and Mr. Treat and Mr. Smith seem to agree pretty well about the outcome of the incorporation and the efforts to sell stock and get some-

(Testimony of H. E. Ellis.)

body to handle it, either in Valdez or other places—they all came to naught, and the failure outside was due to the failure of the people who took it outside, and then the matter stood that way until the spring of 1909, about the time that the Haines man up at the glacier failed to come to time—Now when did you first meet A. J. Crane?

A. I met him here in Valdez.

Q. When?

A. At the time he was up here looking over the affairs of that company.

Q. How long was it before the fifth of June, of that year?

A. It was a few days before, not very long, possibly a week,—I don't know.

Q. Somewhere from five to ten days probably?

A. Yes, I should think it wasn't before that.

Q. Where did you meet him?

A. I don't remember, I think I met him in the street, I am not sure.

Q. Did somebody introduce you to him?

A. Mr. Rider introduced me to him.

Q. Were Rider and Crane together? [222—180]

A. I believe Mr. Rider and Mr. Crane were together.

Q. Do you remember the circumstance, or on what block you met?

A. No, I was all over town in those days.

Q. You don't remember the exact circumstances meeting Mr. Crane except that you and he and Mr.

(Testimony of H. E. Ellis.)

Rider came together somewhere in Valdez and Mr. Rider introduced you to him?

A. That is strong in my memory, that Mr. Rider introduced him to me, because Mr. Rider had expressed a desire to do so and to get us together on this mining property.

Q. You knew that Mr. Crane was in town for some days before that?

A. I knew that he was here before that—Mr. Rider told me.

Q. You had heard of Mr. Crane? A. Yes, sir.

Q. Had George Treat ever talked to you about Crane doing anything with him?

A. Not to my remembrance at all.

Q. Had Bob Coles ever talked with you about meeting Crane?

A. I don't know that he did; I know that Coles was driving a dog team for them up at the glacier at that time and I was seeing him almost every day and he was speaking about the work out there—I don't know that he mentioned him in regard to it, he might have mentioned Crane's name.

Q. Did you and Treat and Crane ever talk together on McKinley Street about this property?

A. We possibly did, after the matter had come up, this would be some time later.

Q. You heard Mr. Treat's testimony that he introduced you to Crane, probably somewhere between the postoffice and Seattle Hotel, somewhere near that corner? A. Yes, I heard it.

Q. This is not correct, is it? [223—181]

(Testimony of H. E. Ellis.)

A. To the best of *knowledge* it is not.

Q. Have you any recollection of talking to Mr. Treat and Mr. Crane in that vicinity?

A. No, I have not— It would be nothing uncommon if I did meet them here in passing by.

Q. Were you introduced to Mr. Crane before you ever talked to either Treat or Smith about the possibility of giving Crane a lease?

A. Yes, I was introduced to him before that.

Q. Mr. Treat and Mr. Smtih never discussed the possibility of making a deal with Mr. Crane until after you had become acquainted with Crane?

A. I think not, that is the way I remember, I don't remember that they did.

Q. Was it before or after that you met Crane that Millard went down to your cabin and saw this rock?

A. This was after I met Crane—possibly the next day.

Q. About the next day? A. Yes, sir.

Q. Mr. Millard brought up the subject himself, did he? A. About the ground?

Q. Yes.

A. Yes, he met me on the street and said he had heard that I had some good ore, carrying free gold, and wanted to know if he could see some or it.

Q. And you took him up to the cabin?

A. I took him up to the cabin and showed him.

Q. And you think that was a day or two after you met Crane? A. Probably the next day after.

Q. Did you say anything to Mr. Millard about having some talk to [224—182] Mr. Crane and possi-

(Testimony of H. E. Ellis.)

bly making a deal with him?

A. No, I did not, had no talk with him in that regard; I had just met Mr. Crane, just met him in the street and was introduced to him.

Q. You didn't discuss your property with Crane then, at that time?

A. Not seriously, not to any extent—there may have been some words said by Mr. Rider.

Q. Did you take Mr. Crane out to your house at any time to look at this rock? A. Yes, sir.

Q. How long after you showed it to Mr. Millard?

A. I think it was the same day or the next morning.

Q. Millard wanted too large an interest?

A. He wanted an interest in the ground other than our first agreement; after we had made our agreement and come to a thorough understanding, as I understood, he wanted control of the ground before he would do anything.

Q. Your first suggestion was a quarter interest?

A. I offered him a quarter interest if he would put up the money to put this proposition on a paying basis, as I thought.

Q. And what did that involve, putting in a mill?

A. That involved putting in a small stamp mill.

Q. And after he looked at the rock and thought it over, he wanted more than fifty per cent?

A. Yes, he wanted at least control of it.

Q. After that how long after that was it, after he went to look at the rock and you talked about a quar-

(Testimony of H. E. Ellis.)

ter interest, how long after was it that he wanted a controlling interest?

A. After he saw the rock and we came to the understanding, the next afternoon, I believe it was the next day, we went down to see [225—183] the ground, probably the next morning—I don't remember the time exactly.

Q. Who went with you when Millard went down there?

A. Mr. Crane and Mr. Rider and I think Mr. Haines and some other gentleman, I don't remember his name.

Q. Mr. Millard, Mr. Crane and Mr. Rider all went the same time? A. Yes, sir.

Q. How long after you met Mr. Crane was it that you went down with him and Mr. Millard and others to see the property, about how many days after?

A. I don't remember just how many days afterwards, after I first met him, I met him in town and it wasn't impressed on my memory very much.

Q. Was it several days before the 5th of June, the date you signed the lease?

A. It could not have been very many days.

Q. Three or four days?

A. It could not have been very many days—I don't remember just the number of days.

Q. When you first talked to Mr. Crane, where was it and was it just between you two?

A. It was between Crane and myself, yes—in his room at the hotel.

Q. That is up at the Buffet?

(Testimony of H. E. Ellis.)

A. No, it is the Seattle Hotel now, upstairs in there—he had a room in there.

Q. That was two or three days before you finally signed up?

A. I couldn't say—it wasn't more than a day or so possibly.

Q. In the meantime had you talked to Mr. Treat and Mr. Smith about the possibility of making a deal with Mr. Crane?

A. Yes, I had spoken to them; as I say everybody in town seemed [226—184] to know about it and there was quite a number of people spoke to me and said they would be glad to see me make a deal with him.

Q. Can you remember when you first talked to Treat or Smith about it and where? Can you remember the circumstances of the conversation?

A. No—it was probably in Mr. Smith's office where we spoke of it together.

Q. You don't remember whether you brought up the subject first or they did? A. No, I do not.

Q. Now, the first time you talked to Mr. Crane in his room at the Seattle Hotel, was there a definite proposition made by either one of you?

A. No, he was wanting to acquire an interest in the property at that time, wanting to buy the property, to get an option to buy the property, rather, buy the entire ground.

Q. And you declined to sell?

A. I told him it wasn't for sale at all.

Q. Which one of you first mentioned a lease?

(Testimony of H. E. Ellis.)

A. I did, I believe; he asked me if there wasn't some other way we couldn't get together as he thought he could handle it and I said, "the only way I can think of might be under a lease, by virtue of a lease."

Q. And was a proposition made by either one of you as to the terms of a lease at that time?

A. "Yes," he said to me, "can't you make me a proposition, what you would consider a fair lease"?

Q. Did you make him one? A. I did.

Q. What was it? [227—185]

A. I made him a proposition of a lease for a three-year period at 25% net royalty.

Q. And the term was entirely too short?

A. The term was too short to satisfy him.

Q. And he thought the royalty ought to be a little less?

A. Yes, he thought a ten per cent royalty, I believe, was his offer.

Q. Before you left him that day had you come any closer to an agreement?

A. Well, possibly he had come down to twenty years or something like that—he didn't think the royalty was so bad but the time, he wanted a long time, practically the life of a mine, a thirty year period.

Q. He was willing to give a heavy royalty if he could get a long term?

A. Not heavier than 25%—that was the original offer of mine, 25%.

Q. After you and Crane separated, did you on the

(Testimony of H. E. Ellis.)

same day talk to Mr. Treat or Mr. Smith something about this?

A. It is very likely I did mention it, if I met them I did. They would ask me, as others around town would ask me, if I had made any deal.

Q. When did you begin to discuss with Mr. Treat or Mr. Smith the terms you would make to them for their claim?

A. That was in the afternoon of the day the lease was signed.

Q. You never discussed that with them until that day?

A. That was the day that we came to some definite terms—we didn't come to any definite terms with Mr. Crane before that.

Q. You say this conversation with Crane in the Seattle Hotel, this first *oen*, was probably two or three days before you signed up?

A. No, I didn't say that—I said it might have been, I don't know,—a day or so probably. I have no idea just the exact time,—it [228—186] wasn't very long.

Q. Now, after you first told Mr. Treat and Mr. Smith or they talked to you about the proposed Crane lease, didn't you at once begin negotiations with them or they with you as to the terms on which they were to come in on this?

A. I asked them for the terms in the afternoon of the day the lease was signed.

Q. Was that the first time that question had been discussed?

(Testimony of H. E. Ellis.)

A. That was the first time it had been discussed.

Q. Do you know whether or not Mr. Treat had ever talked to Mr. Crane before that time?

A. I couldn't say, he possibly did—he had a chance to meet him around town.

Q. Did either Mr. Crane or Mr. Treat tell you that they had talked together before that afternoon?

A. I don't know that they did, I couldn't say.

Q. Up to the afternoon of June 5th, as far as you know, Mr. Treat and Mr. Smith were not in the deal with Mr. Crane and had not conferred with him?

A. To the best of my knowledge they had not; in fact they had no reason or right to confer with him in regard to it, as I understood it.

Q. You hadn't asked their advice?

A. I had told them, simply stated, that I wouldn't give him an option to buy the property.

Q. Didn't Mr. Crane, prior to the 5th of June, tell you that he was going out on the night of the 5th of June? A. Yes, I think he did.

Q. And there was some necessity for haste?

A. Yes, sir, if he could do any business he said he would like to [229—187] get it straightened out before he went out.

Q. And at that time the steamers sailed except in rare instances, when they were behind time, the Alaska Steamship Company's boats sailed on the night of the 5th, 12th, 19th and 26th, midnight—do you remember that? A. No, I do not.

Q. And Mr. Crane was to go out on the boat that night, about midnight?

(Testimony of H. E. Ellis.)

A. It was some time about midnight I think the boat went.

Q. So you knew on the 4th of June that if you made any deal with Mr. Crane, it had to be before midnight of the 5th?

A. Yes,—I knew it had to be made before the boat sailed, rather.

Q. You mentioned to Mr. Crane in some of your conversations that Mr. Smith and Mr. Treat had a mortgage on that property you said? A. Yes, sir.

Q. Was that prior to the 5th of June that you told him that?

A. No, we didn't come to any direct agreement, before I believe it was the 5th of June, the day the thing was straightened up.

Q. You were not overly anxious to make this deal?

A. No, I was not—I would have been glad to make the deal, but I didn't consider he would carry it through.

Q. Wasn't it urged upon you pretty strongly by Treat and Smith and particularly Treat?

A. They spoke to me, as well as a number of others around town spoke to me, and said I ought to try to get it through, it would be such a good thing for this section.

Q. But these others had no interest except the interest of the citizens in the community?

A. And that was the interest that Smith and Treat professed themselves, the interest of the community.

[230—188]

Q. They had also the additional interest—they

(Testimony of H. E. Ellis.)

had some interest in the property—they had their mortgage interest anyway? A. Yes.

Q. Didn't Treat talk to you at least once or twice during the day and urge you if possible to come to terms with Crane?

A. Treat hunted me up and asked me to go back and see Crane.

Q. He suggested in the afternoon some time that Crane was the first live one he had really gotten hold of on a mining deal.

A. I couldn't say he did, no, but he thought Crane was in position to carry this deal out, any deal he went into.

Q. He put it up to you that he was the most promising prospect for doing something that you had ever had.

A. Not that I know of—he did not, but he thought it was a good chance.

Q. What time in the afternoon, if you remember, did you talk to Treat, the afternoon of the 5th of June?

A. I think it was possibly about two o'clock.

Q. At that time had you arrived very nearly at a conclusion with Crane as to the terms of the proposed lease? A. Somewhat, yes, sir.

Q. That is you had agreed practically upon the royalty.

A. He hadn't agreed to the time—there was a little difference in the time, the length of time that the lease was to run, and he also wanted a little less royalty; he thought, in fact he said that he thought

(Testimony of H. E. Ellis.)

they ought to be allowed a year, I believe, before he paid any royalty—that was one of his contentions.

Q. Can you remember about what time in the day it was that you and Crane finally agreed upon the length of the term and the amount of the royalty?

A. I think it was about five. [231—189]

Q. You think it was about five o'clock?

A. I think it was about five o'clock in the evening.

Q. That was after you had talked to Treat?

A. That was after I had talked to Treat and he had given me the letter.

Q. Did you then immediately communicate this proposition to either Treat or Smith?

A. Yes, and told Mr. Smith about the arrangement, we had, that is, the agreement we had come to, so he could draw up the papers and have them ready to sign before Crane went out that evening—I don't remember just the hour, but I think it was probably about five o'clock.

Q. About five o'clock you finally agreed upon the terms with Crane?

A. Yes, sir, that is the idea.

Q. And then did you go almost immediately to Mr. Smith's office and tell him to draw the papers?

A. Yes, sir.

Q. Was Mr. Treat there at the time?

A. Yes, sir, Mr. Treat was there at the time.

Q. And you talked the whole thing over with them before dinner? A. Yes, sir.

Q. And in that conversation did you discuss your settlement with them on their interest?

(Testimony of H. E. Ellis.)

A. Yes, sir, we talked of the matter, in regard to their accepting this 15% and Mr. Smith was to act as my attorney.

Q. Prior to that conversation, which was around about five o'clock had you had any general discussion with either Smith or Treat as to what they were to accept?

A. Yes, I asked them in Mr. Smith's office, I think it was probably two o'clock—I had been up to see Mr. Crane and we had come to [232—190] some agreement—in the neighborhood of it anyway.

Q. You testified in your direct examination that you had one or two conversations with Treat and Smith and they wanted a great deal more than you thought they were entitled to? A. Yes, sir.

Q. And you insisted that you couldn't think of giving up that much—was that on the same day or prior to that time?

A. That was in the afternoon, after I had talked to Mr. Crane.

Q. As I understand you then, nearly all the conversation and the negotiations you had with Treat and Smith as to their interest in this property or in the lease, if one was made, was on the 5th of June?

A. Yes, they were very urgent, because they thought that Crane was going out and they were desirous of getting something put through.

Q. They were very anxious to have something put through on some basis? A. Yes, sir:

Q. They didn't want Crane to escape?

A. That seems to be it.

(Testimony of H. E. Ellis.)

Q. But prior to that time, you had had no talk with Treat or Smith as to what they were to have in case a deal was made with Crane.

A. No, we didn't come to any discussion of that question, because I never thought we would make any deal with Crane, because he insisted on having a controlling interest in the property or the entire interest.

Q. This first talk was about three o'clock on the 5th of June, when they asked for more than they were entitled to and you told them in reference to their proposition, not by a dam-sight [233—191] or something to that effect— Did you before that conversation terminated come any nearer to an agreement with them as to what they would take?

A. No, sir, I left them shortly after—I told them I couldn't give them or wouldn't give them a 20% interest in the property.

Q. Now, then, you came back, after you had practically arrived at a tentative agreement with Crane, you came to Smith's office and found Treat there, about five o'clock and then you three thrashed out the question of what they were to get.

A. No, we thrashed that out before; Mr. Treat had given me this letter in regard to this and he told me that—

Q. First, what time of the day did he give you the letter?

A. That was during the afternoon—Mr. Treat came and hunted me up and had me go back and see Crane and it was at that time he said about what

(Testimony of H. E. Ellis.)

he would be willing to do and he would go and see Smith and he went down to Smith's office and they discussed the thing and he brought me this letter. In the meantime I had been in to see Crane.

Q. He brought you that letter—that was about five o'clock then, just after you had seen Crane?

A. Just after I had seen Crane—I think it was earlier than that.

Q. And Treat gave you this letter on the street?

A. Yes, sir, Treat gave me this letter on the street.

Q. And you then went down to Smith's office?

A. No, after he gave me the letter, I went to see Crane.

Q. It was just before you saw Crane the last time?

A. Yes; we came to an agreement then and Crane had me go down and tell Smith what the agreement was, so he could draw up the papers and have them ready for him to sign, and I went back and told Crane the time he was to come to sign them. [234—192]

Q. Now, this letter, exhibit 9, reading—We will accept fifteen per cent net of royalty on lease of property provided the contract of least is satisfactory. That, of course, would have to be settled afterwards, whether it was satisfactory or not.

A. Mr. Smith drew it up—he was to decide whether it was satisfactory or not.

Q. And this proposition of \$12,500 cash net was impossible at that time?

A. I couldn't get that much of a payment on it, so I supposed, if I made any deal to get a payment down

(Testimony of H. E. Ellis.)

on any of the property.

Q. Now, after dinner, you came into Smith's office, did you, about seven or half-past seven?

A. I think in that neighborhood.

Q. Who was there when you arrived?

A. Why, Mr. Smith was there in his office.

Q. Was anybody there but Mr. Smith when you went in?

A. I don't think so, not to my memory.

Q. Had Mr. Smith prepared the lease already, at that time?

A. I believe it was finished, or in the hands of the typewriter, am not sure.

Q. You don't know whether Mrs. Lockhart was there at the time?

A. She was probably in the other room.

Q. Did you read this over with Mr. Smith, this option agreement with Crane—you can look at it again if you want to—the one of June 5th, 1909, by and between H. E. Ellis, Geo. C. Treat and Edmund Smith, parties of the first part, all of Valdez, Alaska, and A. J. Crane of Seattle, Washington, party of the second part, etc.? (Handing witness Plaintiff's Exhibit "B.")

A. Yes, we read it over.

Q. You read it over? A. Yes, sir. [235—193]

Q. And discussed it? A. Yes, sir.

Q. And there was no further agreement with Mr. Treat and Mr. Smith at that time than is contained in this contract, was there?

A. Only that Mr. Smith agreed to act as my attor-

(Testimony of H. E. Ellis.)

ney in all matters pertaining to the company, in all matters pertaining to this property.

Q. And was that a part of the conversation?

A. As a part of this 15% royalty, had been agreed upon before we had discussed it before and he was to do that as a part of it.

Q. This you remember is a six-year lease, the same the Millard lease? A. Yes, sir.

Q. Now, what time was that signed up that night?

A. Well, I think possibly something about half-past seven.

Q. You didn't talk very long about it?

A. Not a great while; we sat and talked and discussed the probabilities of the mine in general and that section talked quite a little while—I don't know whether it was just after or just before we signed it.

Q. You have read this lease, this option agreement lately, given to Mr. Crane? A. No, I have not.

Q. You are aware of the fact that it runs from all three of you to Mr. A. J. Crane?

A. As parties of the first part, yes, to Mr. Crane.

Q. Was there any discussion between you and Mr. Smith as to the meaning of any of these various paragraphs other than the term of the lease and the amount of the royalty? [236—194]

A. Why there probably was, I don't remember just now just what there was.

Q. The second paragraph reads this way—

That for and in consideration of the sum of One Dollar in hand paid by the *part* of the second part to the parties of the first part and the

(Testimony of H. E. Ellis.)

carrying out of the further covenants herein mentioned the parties of the first part hereby give and grant unto the party of the second part the exclusive right, privilege and option to lease eight lode mining claims situated on the North side of Valdez Bay, known as the Mystic Group, Territory of Alaska, located by H. E. Ellis, one of the parties of the first part.

Why did all three of you sign that if you owned the whole property?

A. Because they were to receive an interest in the royalty.

Q. That was the only reason, was it?

A. As far as I know, it was.

Q. *When* did you begin negotiating with Mr. Millard again? A. I did not.

Q. He bought the Crane lease or the Crane option?

A. Yes, sir.

Q. And had all the rights under it—didn't you have some discussion with Mr. Millard as to making a new lease with him?

A. Yes, we got together in the evening of the day the time it was to expire, I believe, and talked the matter over, or rather outlined it—Mr. Smith, I believe, took notes.

Q. What time of the day was this lease of July 23d with Millard signed?

A. I don't just remember what time of the day it was signed, I know we got together in the evening of the day the option was to expire and discussed it; it might have been signed that evening, but it was

(Testimony of H. E. Ellis.)

probably the next day. I had been across the Bay to Solomon Gulch and couldn't get back by boat so I walked around and got in here that evening, and my remembrance of it [237—195] as it was rather late in the evening when I got in there.

Q. To refresh your memory I will ask you if it is true that the Crane option is silent as to the date of its expiration but the verbal agreement was that it was for thirty days?

A. I really don't remember whether it is or not, I haven't read it over for some time, I don't remember really—it is a long time since I read it.

Q. What is your impression as to the time Crane was given? A. Thirty days was the idea I had.

Q. That would be until the 5th of July?

A. Yes, sir.

Q. Do you remember a cable coming from Crane or somebody representing him asking for thirty days more?

A. No, I do not—it did not come to me at any rate.

Q. Weren't you informed that a cable had come?

A. If it came I probably saw it.

Q. You granted an extension of time of thirty days, did you not? A. I believe we did.

Q. That would carry it until about the 4th of August? A. Yes, sir.

Q. Now, on the 23d of July, you think you signed this up in the evening? A. Yes, sir.

Q. Had you discussed thoroughly with Smith and Treat the provisions of this lease?

A. We discussed it after it was drawn up before

(Testimony of H. E. Ellis.)

Crane came into the office.

Q. I mean the Millard lease, on the 23d of July?

A. We had a discussion in Mr. Smith's office after the lease was drawn up, before Mr. Millard came in. We talked the matter over, the three of us. [238—196]

Q. Did you discuss all the important points in it?

A. That occurred to me as being important—I might have missed some of them, the chances are I did.

Q. Did you take a copy and read it?

A. Yes, he used the original and allowed Treat and I each to take a copy and read it.

Q. You read it for yourself? A. Yes, sir.

Q. What did you say, if anything, at the statement in the first paragraph—

“This indenture, made this 23d day of July, A. D. 1909, between H. E. Ellis, four-fifths owner, George C. Treat, and Edmund Smith, each owning ten (10) per cent, all of Valdez, Alaska, parties of the first part and lessors, and B. F. Millard, Trustee, of Valdez, Alaska,” etc.

What was your understanding of that provision?

A. I objected immediately to that provision, to that way of expressing the ownership.

Q. Did you ask to have that stricken out?

A. I asked why it should be put in and Mr. Smith said he thought it would be better to put it in that way as owners, he could better protect the property and look after their interest as well as mine and while acting as my attorney in the matter he thought it

(Testimony of H. E. Ellis.)

would be better to put it that way.

Q. You had previous experience in the way of leasing mining properties?

A. I didn't have much experience in business matters.

Q. Didn't you understand at that time as you undoubtedly do now, that it never helps a legal contract to make a false statement in it?

A. I understand it more thoroughly now than I did at that time.

Q. At that time you say there was a specific agreement between [239—197] yourself and Mr. Treat and Mr. Smith that they were to take 15% of the royalties under the Crane lease and you understood the same agreement was carried into the Millard lease, that they were to take 15% of the royalties derived from that property during the six-year term, as liquidation in full of all their demands?

A. That was my idea and thorough understanding between all of us.

Q. Then why, if that was the agreement and thorough understanding of all the parties didn't the lease say H. E. Ellis, owner of 85%, George C. Treat and Edmund Smith each owning 7½%?

A. I don't remember Mr. Smith's explanation of that at the time, but he undoubtedly made a good one, that is, something that would satisfy me—I thought he was a friend of mine and doing the best he could for my interest and acting in a legal way for me in drawing this paper up. I also considered Treat a very warm personal friend at the time and I didn't

(Testimony of H. E. Ellis.)

think that either one would try to—

Q. Didn't it appear to you strange that if you agreed in any event that all they were to get out of this property was 15% of the royalty, that they should incorporate in this lease a provision that they should be named as the owners of 20%?

A. Yes, that they should be named in any per cent of ownership, and I discussed the thing with Mr. Smith in that light.

Q. Didn't that arouse any suspicion in your mind—that while they were willing to take 15% of the royalties, they wanted you to sign a document that declared they owned one-fifth of the ground?

A. Yes, it did, but *we* offered a very smooth explanation of that in that way.

Q. That explanation that he gave didn't make *much an* indelible impression upon your mind that you can tell now what it was? [240—198]

Yes, he said that in fact he didn't matter what per cent—he gave me the idea it didn't matter what percentage he claimed or the document expressed as the percentage they owned, that he simply put that in that he could better represent me and themselves, acting as my attorney, especially if I was going to be absent, which I was—he brought that up, as I was absent a great deal of the time, out in the hills prospecting, he could look after my interest better with the company.

Q. He didn't give any reason for making it 20% instead of 15%?

A. Not that I remember, only the matter was im-

(Testimony of H. E. Ellis.)

material as to what per cent it should be when it was so thoroughly understood between us that he owned no interest in the property except the 15% of the royalty.

Q. (By the COURT.) Why was Treat's name put in there? If Smith's name was put in on that theory that he could protect you? Was anything said why Treat was put in as the owner then?

A. I say the two of them—I asked why they should be put in and that was my reply, it was put in for that purpose, that they should better be able to protect my interest as well as their own.

Q. That was the sole reason. Now, you have a fair education, have you not?

A. Not so extraordinary.

Q. You at that time had enough business experience to know that when a man asks you to make a statement that both you and he agree is untrue in a document of such solemnity as a deed or lease that there must be something ulterior reasons for it?

A. It never struck me at the time that there was any ulterior reason. I had known Mr. Smith and Mr. Treat for some time and thought very highly of them and it didn't strike me at all that there was any ulterior reason, especially with this explanation.

[241—199]

Q. Now, you read this clear through, did you, the Millard lease? A. I did, at the time.

Q. You were aware of the fact that it refers repeatedly to you three gentlemen named, as lessors and owners, etc.—it refers to you as owners, you are

(Testimony of H. E. Ellis.)

aware of that, you know that?

A. Yes, sir, the same as it does in the beginning of the lease.

Q. It calls for the return of the property to you three at the expiration of the lease, does it not?

A. I don't remember just how it does read.

Q. And on Smith's statement of this proposition, which you now understand was so remarkable, that it was *absolute* necessary for a man who was going to act as your agent in regard to a lease of mining property that he should be named as one of the owners, when in fact he was not, on the strength of that statement you signed this document?

A. That it was not absolutely necessary, but it would greatly favor their handling of it, if they were known as part owners of the property.

Q. It didn't occur to any of you that you could give them, either Smith or Treat, or both of them, a power of attorney?

A. It wasn't mentioned at the time, at least, and I didn't think of it.

Q. In this conversation when you finally settled on the 15% royalty, wasn't their claim pretty thoroughly discussed, their claim against you?

A. At the time I refused to allow them the 20%.

Q. Yes—that was before you made the Crane lease?

A. Yes, sir.

Q. You didn't discuss it again in talking about the Millard lease?

A. Only they were to accept the 15% in full liquidation.

(Testimony of H. E. Ellis.)

Q. You are aware that the articles of incorporation which you [242—200] three had signed in 1908, gave to Treat and Smith 20% of the property, did it not?

A. Yes, sir, it would, if it had been carried out.

Q. That was still in existence until all of you agree to abrogate it? A. Yes, sir.

Q. Then at the time you were negotiating as to the Crane lease, Treat and Smith owned one-fifth of the property?

A. They had agreed to drop the incorporation proposition quite some time before—that had fallen through.

Q. That was a dead one before that time?

A. Yes, sir, they agreed to drop that and to consider that the mortgage was in full force, the mortgage against the property.

Q. Strictly speaking, under the incorporation agreement, they would have one-quarter, because one-fifth of the stock was to be left in the treasury—you got 60% and they got 20% and they were, of course, to have an equal interest in the proceeds of the treasury stock?

A. The proceeds of the sale of the treasury stock were to be applied only to the development of the mine.

Q. But that would increase the value of their interest in the same proportion as yours?

A. Yes, sir.

Q. So the relation of their interest to yours was one to three under that agreement to incorporate—

(Testimony of H. E. Ellis.)

now you wish the Court to understand that when you had such an agreement as that—it had been verbally agreed to drop it, but as far as the papers were concerned, it will *still in* existence up to just prior to the signing of the Crane lease—you wish the Court to understand that although they had this corporation agreement and [243—201] it was still in existence, so far as the papers were concerned, which gave them one-third as much interest as you had, and they also had a first mortgage on the ground, which they could foreclose at any time, that they were willing to give it up and take a much smaller interest in a six-year lease?

A. Yes, they were perfectly willing because they were perfectly satisfied they could not carry through the corporate agreement and get their interest in that way.

Q. They were willing to accept the 15% and Smith was willing to act as your attorney gratis?

A. He offered his services gratis.

Q. Now, when you signed these various notices to the Company, to the Cliff, which were introduced here in evidence yesterday, in which yourself and Treat and Smith are described as owners—did you ever protest against that form of notice?

A. No, sir, I did not; that was in line with our discussions at the time of the signing of this lease, it was right in line with it; he was carrying out the agreement we arrived at at that time, that he was to act for me, to draw up papers and act for me, as my attorney, in regard to the Cliff Company.

(Testimony of H. E. Ellis.)

Q. You said a little while ago in answer to Mr. Ganty's questions, if I remember your testimony, that you never knew that they asserted any claim to an interest in the property until you got Mr. Treat's letter last winter, but you said you did not consider that a demand.

A. I did not consider that a demand, no, sir, on the property.

Q. So you did not believe they asserted any interest in this property up to the time they filed this suit against you?

A. No, sir, I did not understand it that way—I understood, I always understood, that their interest was in the net royalty from the lease,—that is all the understanding I ever had in [244—202] regard to it.

Q. Mr. Bunnell was your attorney generally, was he not, that is in some matters.

A. No, sir, not that I can recall.

Q. You employed him sometimes and Mr. Ganty sometimes?

A. Mr. Ganty usually did the small business I had—I didn't have very much.

Q. Did you ever consult Mr. Bunnell about any difficulty or difference with Treat and Smith on the ownership of this property?

A. At the time the suit was on in the Gold Bluff case, the Gold Bluff Mining Company, he mentioned the fact that—he asked me—he said, don't they claim an interest in this? I said, "well, I understand that Mr. Smith sold an interest to Archibald, but" I said,

(Testimony of H. E. Ellis.)

"I don't understand how he could, he didn't have anything to sell, unless it was his interest in the royalties," I said, "he might have sold him that." "Well," Mr. Bunnell said, "there was no one come forward in this case to deny your rights, this should bar them from it ever coming up."

Q. Didn't you know as a matter of fact about two years ago that this claim was going to be asserted or was already asserted?

A. That was about the time, just as I say, Mr. Bunnell brought the thing up, Mr. Kraemer had also told me that I had a new partner in the ground in the claims.

Q. If Mr. Bunnell two years ago or nearly so consulted other attorneys in this town as to their option of the real meaning of that Millard lease, he did it without any suggestion from you?

A. Yes, sir, without any suggestion from me.

Q. You didn't know that at that time Mr. Bunnell was agitating himself somewhat about the claim of Treat and Smith to an ownership of one-fifth of this ground?

A. Only as I stated—he enquired of me if they did own an interest. [245—203]

Q. You never employed Mr. Bunnell to look up this question of title and inform you as to your rights and his opinion? A. No, sir, I did not.

Q. Now, after this lease was given, did you ever have any conversation with Mr. Treat and Mr. Smith as to what would be done with the ground at the expiration of the lease?

(Testimony of H. E. Ellis.)

A. Yes, we had several discussions on the subject. They said they would like to go in with me at the end of this lease, become interested with me in mining it and also Mr. Lathrop said the same thing.

Q. They would like to become interested?

A. Yes, sir.

Q. They didn't assert then that they had an interest?

A. No, they would like to become interested with me in handling the property after the expiration of the lease—you probably won't want to stay here.

Q. You state positively from the 5th of June, 1908, when the agreement was made that they would take 15% of the royalties paid under the Crane lease until you had notice of the filing of this suit, there never was any discussion or talk between yourself and either Mr. Treat or Mr. Smith which indicated that they claimed ownership.

A. Not to my knowledge.

Q. You have no recollection?

A. I don't think there was at any time.

Q. Is it not a fact that on the 5th of June, 1909, when you and Mr. Treat were discussing back and forth the terms on which they would get an interest in the Crane lease, that they specifically stated, for the sake of getting the lease which was in very much doubt at that time, because Mr. Crane was [246—204] only going to remain in town a few hours, in order to hurry you up and get the lease signed before Crane left town, they agreed to take 15% of the royalties, that they positively and unequivocally

(Testimony of H. E. Ellis.)

stated to you that they intended to and expected to retain their one-fifth interest in the ground.

A. No, sir.

Q. There was no such statement as that at all?

A. No, sir.

Q. There was no possibility of a misunderstanding at the time?

A. I don't see how there could possibly have been.

Q. One of two things is true, is it not, either that they unequivocally agreed to accept 15% of the royalties under the Crane lease for six years in settlement of every possible claim they had against you, including the Treat mortgage against your little house in town, either that statement is true or it is true that they still claimed one-fifth of the ground but agreed to waive part of the royalty during the terms of the lease—one of those things is true, is it not?

A. It is true that they agreed to accept 15% of the royalties as full payment for all their claims, all my indebtedness to them.

Q. At the time you were only giving Mr. Crane an option?

A. Yes, sir; and in talking this over I made mention of the fact, that I did not think that Crane would be able to carry out his agreement and I said, "Of course, I will still owe you the money, I will still be indebted to you for the money and the mortgage on the property is sufficient to cover that."

Q. Now, at that time all you or Mr. Treat or Mr. Smith or anybody else knew about this property was

(Testimony of H. E. Ellis.)

that you had a little work done on a little ledge that showed very great values—there was no assurance that any time within the six years, if Mr. [247—205] Crane started on the work that there would be any royalty paid, was there?

A. There was the assurance that if the property continued to develop as it had and was worked in a workmanlike manner, that it would pay a big royalty.

Q. There are a great many mines that promise to pay a big royalty that never do—there are about a dozen of them in Valdez, in the Valdez district, that have been a sure thing and have never paid anything? A. Not to my knowledge, there is not.

Q. That is true in every mining camp, is it not?

A. I don't know.

Q. So that Treat and Smith, on the 5th of June, were willing to give up their \$760, their claim for \$760, their claim of an interest in the ground which they had theretofore had or claimed to have had, to give that up for a gamble of 15% of the royalties that A. J. Crane might take out of the ground?

A. They were willing to do that—they didn't consider it a gamble.

Q. That is what they agreed to do?

A. They agreed to accept 15% of the net royalties.

Q. And if Crane or Millard, under this lease, had worked for six years and had just about taken out running expenses and no royalty had ever been paid, Mr. Treat and Mr. Smith would never have received any royalty but their \$760 due from you would have

(Testimony of H. E. Ellis.)

been paid by the terms of that lease?

A. Would have been paid?

Q. Yes—according to your statement the agreement expressly was that they were to take 15% of the royalties out of the Crane lease, and afterwards the Millard lease, for their indebtedness.

A. They had my word that I would still be good for the money that I owed them. [248—206]

Q. How about these amended location notices—you saw them, did you?

A. I have no remembrance of ever seeing them.

Q. You heard some talk about them?

A. Yes—they were to be posted by Mr. Storm.

Q. Mr. Smith is mistaken when he says that he and Mr. Treat signed them up and gave them to you to be signed by you and posted on the ground?

A. As far as I know he is about giving them to me—I have no remembrance of having them given to me.

Q. Now, about the payment of these expenses for the Gold Bluff contest—that Gold Bluff case was settled just before you went outside two years ago?

A. Yes, sir.

Q. So it was all over before you went away?

A. Yes, sir.

Q. Were any of the bills for conducting the case presented to you before you left?

A. Frank Nelson had carried Storm back and forth a time or two, I believe, during the surveying and he presented me with a bill or two.

Q. Haven't you ever been shown Mr. Storm's bill

(Testimony of H. E. Ellis.)

for surveying expenses?

A. Mr. Storm mentioned it to me once or twice and I referred him to the Cliff Mining Company, that they had instituted the suit and were to pay all the expenses.

Q. The company did not institute the suit?

A. It had been, under an agreement that they were to stand the expense.

Q. With whom was that agreement made?

A. Made with Mr. Lathrop.

Q. Did he have authority to make it? [249—207]

A. To the best of my knowledge he did.

Q. There was a board of directors of the Cliff Mining Company.

A. He had charge of their business there and it was understood by me that what Mr. Lathrop said went.

Q. Mr. Millard was president of the company, was he not? A. He probably was.

Q. Did Mr. Lathrop give you anything in writing to the effect that the Cliff Mining Company would pay? A. No, he gave me his word.

Q. And you assumed he had the authority?

A. I assumed he had the authority and he also went across the street and told Mr. Bunnell to start the proceedings.

Q. When did you first learn that the Cliff Mining Company had charged all this back to you?

A. I didn't learn that they had actually charged it back until this summer; at the time there was some discussion about these bills—it was shortly after,

(Testimony of H. E. Ellis.)

about the time that this suit was completed, about the time the settlement was made.

Q. Did your brother notify you anything about it while you were gone?

A. I don't remember that he ever did.

Q. Have you ever offered to repay to Mr. Treat and Mr. Smith the money that was charged to them?

A. No, sir, I surely have not.

Q. Now, you know enough about law certainly to know that even though the Cliff Mining Company was absolutely bound to defend that suit that you, as the owner of the title, if they neglected that duty, would be obliged to do it, in order to protect yourself?

A. I would have gone ahead and tried to carry it, tried to protect myself, if they had refused, but they didn't refuse. [250—208]

Q. That is to say you knew if the Cliff Mining Company defaulted and you defaulted that the party you were up against would take judgment?

A. Yes, sir.

Q. And the only reason you had that caused you to leave this to the Cliff Mining Company was Mr. Lathrop's statement?

A. Mr. Lathrop's statement and the general wording of the lease.

Q. At the time you talked about the survey, sending Mr. Storm down there, was there any discussion about who was to pay for that?

A. There was some discussion as to the company assuming part of it and the rest being charged—I

(Testimony of H. E. Ellis.)

understand it was to be charged to the mining and milling expense, which would be divided.

Q. Who told you that?

A. I don't remember, that was my understanding of it.

Q. You don't remember any specific conversation.

A. I think probably it was taken up with Mr. Millard at that time.

Q. That is just an impression you have?

A. That is just an impression I have.

Q. You don't remember distinctly any talk?

A. No.

Q. Wasn't the first proposition to charge it to the royalty account.

A. I don't remember that; the proposition when it first came up was to carry the thing through to a patent; which was to be charged possibly to me—I don't remember now—the discussion, we never got that far with it anyhow, so it dropped out of my mind what the discussion was.

Q. Going back for a moment to the time when you were negotiating with Mr. Crane, in the first week in June, 1909—you are positive [251—209] that Mr. Treat took no part in any of these negotiations?

A. Not with Mr. Crane and I, at least I have no remembrance of it.

Q. You are positive you did not confer with Mr. Treat and Mr. Smith several times about it and tell them how you were getting on until the last time?

A. I discussed the matter with them and with a number of other parties around town that had in-

(Testimony of H. E. Ellis.)

quired of me, not only them but others. Mr. Crane had mentioned it to several other parties and they asked me how we were progressing, if we had made any arrangements and one thing and another like that; they took a good deal of interest in getting the thing started—they were all interested in the town and wanted to see it go ahead.

Mr. RITCHIE.—That's all.

Witness excused. [252—210]

[Testimony of H. L. Rider, for Defendant.]

H. L. RIDER, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. GANTY.

Q. What is your name? A. H. L. Rider.

Q. Where do you reside? A. Valdez, Alaska.

Q. What is your occupation?

A. Millwright and millman, amalgamator.

Q. When did you first come to Valdez?

A. 1907.

Q. State what you were doing when you first came here, what you did after you first got here.

A. I came to Valdez first and then went to Knights Island and returned to Valdez.

Q. Were you during that summer working on the glacier here for the Haines people?

A. Not that summer, not in 1907—that was in 1909 when I was employed out on the glacier for Haines.

Q. You are sure it was 1909?

A. I am quite positive it was 1909.

Q. You were working for Haines? What were you doing?

(Testimony of H. E. Ellis.)

A. I was hired in Seattle to take charge of the erection of a mill which they had purchased in Seattle.

Q. What did they do with the mill?

A. They disposed of it to the Cliff Leasing or Mining Company.

Q. Do you know Mr. A. J. Crane? [253—211]

A. Yes, sir.

Q. When did you first meet him?

A. It was about the first of June, probably the last of May or the first of June, 1909.

Q. Were you acquainted with at that time or did you know of the Cliff Mining property, the property that is now the Cliff mine?

A. I had been informed there was a prospect on Valdez Bay by a party, Mr. Dean.

Q. Who was the reputed owner at that time, if you know? A. Mr. Ellis.

Q. You knew that at that time?

A. I was told that the property belonged to Mr. Ellis.

Q. State, if you know how Mr. Crane came to hear about this.

A. Mr. Crane came up to the glacier where we were camped at that time and seeing the conditions up there, he was not satisfied with them, therefore he concluded to shut down the operations and asked me if I knew of any place where he could dispose of the mill which they had already purchased and I told him I did not know positively, but I had heard of a prospect known as the Cliff, owned by Mr. Ellis, that

(Testimony of H. L. Rider.)

had a very good showing and it was possible he might make some deal with them. Mr. Crane said he would look into the matter and we came down to Valdez, where I am quite sure I introduced him to Mr. Ellis and I don't know of any further transaction that day, that I know anything about; I think I went back to the glacier and he returned up there, informing me that he had made arrangements to go down to the mine and wishes me to go with him, and also Mr. White, who was assayer for the company, and examine the property, which we did; we went down on the Gelena with Mr. Millard and made quite a thorough examination of the property, took the samples [254—212] up to our own assay office and ran them, gave Mr. Crane the returns and they were satisfactory to him and he immediately started negotiations for a lease.

Q. In what capacity did you go down there?

A. I was told to go as an experienced miner, to take samples and examine the property.

Q. That is practically all you know in connection with the matter?

A. Practically so—that is the way Mr. Crane came to know the Cliff mine, etc., and who went down and took the samples, etc.,—that is about all I know of interest.

Q. You had no other conversations with any of the parties to this action at that time after you introduced Mr. Crane to Mr. Ellis, that is to Mr. Treat or Mr. Smith? A. I don't think so.

Mr. GANTY.—That's all.

(Testimony of H. L. Rider.)

Cross-examination by Mr. RITCHIE.

Q. Where did you and Crane meet with Mr. Ellis?

A. He was on the streets of Valdez; I think Mr. Crane's room was in the Seattle Hotel, but I think we were out on the street—I came in from the glacier with him.

Q. Do you know whether Mr. Crane and Mr. Ellis had met before?

A. I don't know as they had—I introduced them.

Q. You don't know for a certainty whether or not they had met before?

A. I certainly do not, but I introduced them.

Q. You very often have been introduced yourself to a man you have met before? A. Yes, sir.

Q. Did you take any part in any of the conversation or did you just leave them? [255—213]

A. I introduced them and told him Mr. Ellis was the man owning the prospect down the Bay, which I had reference to, had told him about.

Q. Was there any further talk in your presence between them?

A. No, sir; not Ellis and Crane and myself.

Q. Did you meet Crane and Ellis at any time afterwards and take part in any talk about this matter?

A. No the three of us—Crane came repeatedly and spoke to me.

Q. And asked your advice?

A. And asked my advice in some things, in certain things.

Q. You talked no further to Ellis?

(Testimony of H. L. Rider.)

A. Nothing at that time, no, sir.

Q. Where are you working now?

A. I am not working at present—I have been down at the Cliff Mine working about two months and a half, but have not been there for six weeks or more.

Witness excused.

By the COURT.—There is one matter I want to ask Mr. Ellis.

[**Testimony of H. E. Ellis (Recalled by the Court).**]

H. E. ELLIS, recalled by the COURT.

Q. Mr. Ellis, you left Valdez, you say, about December, 1913? A. Yes, sir.

Q. And you were gone until May of this year?

A. Some time the latter part of May, 1915.

Q. During that time have you kept in touch with these Cliff matters through your brother, who was your agent here?

A. Not very well; he was not very good to write letters, and he didn't keep me very well posted.

Q. Has Mr. Ganty during that time represented you as attorney and have you had correspondence with him? [256—214]

A. Yes, I had one or two letters from him in regard to it.

Q. You were interested in finding out how you stood with the Cliff Company?

A. Yes, sir; I was.

Q. When they shut down in August, 1914, surrendered their lease, you were interested in knowing

(Testimony of H. E. Ellis.)

how the matter stood and how you stood with them?

A. Yes, sir.

Q. Did you get a statement?

A. There were statements forwarded to the States. I was probably in Denver, Colorado, at that time—I had just come from the east and these statements were forwarded to me in the east, and they thought when I was back there that I was getting considerably better than I had been; I was quite sick, and they thought I was coming right through and they forwarded back to me to Valdez my mail and papers and they were quite a good deal of time on the road and I got some of them here in town and some were forwarded to me just before I got home.

Q. This statement dated April, 1914, regarding this bill of costs in the adverse suit and the survey and all these things, was that forwarded by your brother or any one else?

A. I don't think it was; if it was, it was one that was returned here and I didn't get it until I got back to Valdez.

Q. A matter of that importance, a matter of a charge against you of a thousand dollars or so, wouldn't that be called to your attention for a whole year?

A. I don't think—I don't know just when these papers, these statements were made out.

Q. That was made out and delivered, so Mr. Kraemer says, in April, 1914, aren't you able to say whether, through your brother or [257—215]

(Testimony of H. E. Ellis.)

through Mr. Ganty, or anyone else, you received that?

A. I received that, I think, after I returned to Valdez.

Q. Then the matter of this charge of a thousand dollars or so against you, you did not know anything about for a year or so after it was rendered to your brother as your agent?

A. I understood, before I left—Mr. Storm had brought the matter to my attention, and I had referred him to the Cliff Mining Company for settlement.

Q. Didn't you know the Cliff Mining Company had deducted it from your royalties until a year after it was done?

A. No, sir; that was about the time—about a year afterwards.

Q. Is your brother here now?

A. No, sir; he is in Colorado.

Q. Do you know whether he did receive this in April, 1914? A. No, I do not.

Mr. GANTY.—I intend to clear up this very point—I intend to introduce evidence to clear it up.
Witness excused.

Mr. GANTY.—We will call Mr. Hughes. [258—216.]

[Testimony of John Hughes, for Defendant.]

JOHN HUGHES, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. GANTY.

Q. What is your name? A. John Hughes.

(Testimony of John Hughes.)

Q. You are acquainted with all the parties to this suit, I believe?

A. Yes, I have a slight acquainted with most of them, quite well acquainted with some of them.

Q. How long have you resided here?

A. About twelve years.

Q. What is your occupation?

A. Prospecting and mining.

Q. I will ask you if you had occasion to go to the Cliff Mine about June or July, 1914?

A. Yes, it was somewhere about July 6, 1914; I met Mr. Will Ellis in town, brother to H. E. Ellis, and he told me his brother was in Denver under a doctor's care, very sick, and the Cliff had quit; that Mr. McDougall, the man in charge, had gone to the Gold King and he wished me to go down there and keep track of it and see that nothing was removed from there. I went there and arrived there the 8th of July.

Q. State what you did and who went with you.

A. Will Ellis and I went down there and we found there were two or three men working there, and there were several women living there and Mr. Ellis told them, a man named Minnick apparently was in charge, he told them he had come down to take charge of the property for his brother, as his brother's agent, and he was intending to leave me there in charge of it. Minnick delivered up the keys, took me around, and showed me the mining equipment, machinery, mill, etc., and all the place, and [259—217] Mr. Ellis took me to the mess-

(Testimony of John Hughes.)

house and told me I could sleep there and cook there until he relieved me, so I stayed there from that time on until close to Thanksgiving, within a few days of Thanksgiving. He gave me orders not to allow anything to get away, to be taken off the ground, but to use anything I want for working on the ground—he showed me several places he wanted prospected.

Q. In what capacity did he give you these orders?

A. As the agent of his brother—I know he was known as the agent; I had accepted money through him from his brother for work I performed before.

Q. You had done work for him before?

A. Yes, sir.

Q. How did you get paid off?

A. Why, Will Ellis paid me while his brother was away.

Q. In checks?

A. It seems to me he gave me a check, I am not quite sure on that point—I am pretty sure it was.

Q. Do you remember how he signed it?

A. No, I can't recall.

Q. On what properties did you work for him?

A. I worked on the Imperial ground.

Q. Did H. E. Ellis ever state to you that he had made his brother his agent?

A. Yes, he asked me at one time to show him some property, show his brother, his brother was going to take charge, he said, while he was gone; he was going below; he was going to act as his agent.

(Testimony of John Hughes.)

Q. In what capacity were you asked to go down there and remain there, as you have testified?

[260—218]

A. Well, he asked me to go down and take charge and keep track of all the property there and not allow any of it to be removed and he wishes me to prospect the ground and showed me several places he wanted me to prospect.

Q. Did anybody come down there and try to remove some tools from there?

A. Not for some time; Mr. Millard got some little dynamo that was personal property, that was in Mrs. McDougall's house. Several people tried to get stuff, tried to get me to loan stuff.

Q. What date was it that Mr. Millard came down there?

A. That was somewhere along about the, I think it was the 12th of August, some time prior to the 15th of August, anyway, because he told me they hadn't intended giving up possession until the 15th. I protested against their moving stuff, and he said the Cliff Mining Company didn't intend to give up possession until the 15th. I had reason to know this dynamo belonged to him personally and was in Mrs. McDougall's house.

Q. You were there on the 15th of August, were you? A. Yes, sir.

Q. State what occurred on the 15th of August.

A. Well, I don't remember much; Will Ellis came down there; at that time I had a journal; I kept

(Testimony of John Hughes.)

track of most things in, and I put in the journal that Will Ellis called that day—a diary I kept.

Q. A diary you kept from day to day?

A. Yes, sir.

Q. Have you got it here?

A. Yes, I have it in my pocket.

Q. You may look into that and refresh your memory.

A. That is all I put in the 15th of August—I just put, W. Ellis called, and that is all; there was nothing of importance transpired, [261—219] I guess, on that day.

Q. That is the 15th? A. Yes, sir.

Q. Did you at that time have the keys to this property?

A. I had the keys to the property all the time, from the day he gave them to me.

Q. You had? A. Yes, sir.

Q. When did you first see Mr. Treat after you first got on to that property?

A. Treat and Archibald came there on the 18th of August.

Q. State what occurred at that time.

A. Why, they were putting up some notices on the mill there, warning people against trespassing, he and Archibald were putting them up there, and I think I suggested to them at the time that they ought to see Will Ellis, the agent, before doing this, and Treat left some notices for him to sign; he said he was just doing this out of friendship for Ellis,

(Testimony of John Hughes.)

wanted to protect his property and warn people from trespassing, and warned me that if I let anything go, I was subject to the penitentiary or something of that kind, and kinder scared me a little.

Q. Was that all that was said?

A. I don't remember; we had quite a conversation, Treat and Archibald and myself; Archibald said he had bought an interest from Smith, a part of the interest from Smith; that Smith claimed an interest in the property—it was the first I had heard of any interest in the ground and I told him so. He said, well, he wouldn't lose much, Smith told him if he didn't make good on the tenth, that he would give him his money back, and he said he didn't care much about it—at that time the property didn't look [262—220] good, anyhow.

Q. Did Mr. Treat say anything about paying you at that time?

A. I don't think he did, at that time, but later on, he did.

Q. What did he say?

A. It was some time, quite a little while after that—I can tell the date from my book (witness refers to book)—on the 20th of August, no, on the 19th of August, Mr. Treat sent an order down to me to send up some steel by Mr. Callahan for a friend of his, as an accommodation, and I refused to send it at the time, on account of orders I had gotten from Mr. Ellis and also this notice, although I didn't know the standing of the thing. The next time he

(Testimony of John Hughes.)

came down he said I should have sent this stuff up and wanted me to understand that he had something to say in the matter himself. I had written a letter in the meantime explaining why I didn't send this, that I expected to draw my wages from Mr. Ellis and as long as I was doing so, I would try to look out for his interests and keep his stuff together, and he came down and told me that stand was all right, but he wanted me to understand that he also was paying my wages, or intended to, something of that kind, but I couldn't see I had any right to let any of the property *to*, and didn't let any go.

Q. Did he make any direct demand upon you for any of that property?

A. It was just a written order, a letter, to send steel up by Callahan, which I refused to send.

Q. Did he come up and demand it himself later on? State whether he came and demanded any of that property.

A. He came down the next day himself and stated he would like to get that stuff, that steel, sent up but I didn't send it—I [263—221] think I told him I didn't have it, or something of the kind.

Q. You heard Mr. Treat's testimony about getting some keys, did you not? A. Yes, sir.

Q. State, if you know, just about what that incident was, about the keys.

A. Well, this key business—Mrs. McDougall stayed there after her husband went to the Gold King, and she had some keys, in fact almost any key

(Testimony of John Hughes.)

would fit the little door or fit the doors—there was quite a bunch of keys, and several doors were without locks, and she got an order from Colonel Millard, something about these keys—anyway, Treat handed the keys to me; I saw him pick them up there.

Q. Did you see this order?

A. I did, yes—I saw the letter.

Q. What was said in that letter?

Mr. RITCHIE.—Have you the letter?

A. The letter was not to me, it was just an order, and the lady showed it to me afterwards.

Q. State what was in the letter.

A. The letter stated to not give up the keys to Mr. Treat and also said, lay them somewhere where he could pick them up, and I saw Treat pick them up there.

Q. Did you ever, at any time, receive any money from Mr. Treat for staying down there?

A. Not for any purpose; no, sir, never.

Q. Who did pay you?

A. I received payment from Mr. Ellis for the work I done down there always.

Q. You never asked Mr. Treat for any money?

A. I certainly did—I asked Mr. Treat for wages when I came up [264—222] from there, as he promised to pay me wages.

Q. What did he say then?

A. Well, I can't remember the exact words.

By the COURT.—You did ask Mr. Treat?

A. I certainly asked Mr. Treat for wages, be-

(Testimony of John Hughes.)

cause he promised, and said he was responsible for my wages; when I left there about Thanksgiving, Will Ellis referred me to Mr. Ganty and there was some little talk about royalty, but I needed the money very badly at the time, and I thought of what Mr. Treat had said and asked him if he could pay me as he promised, and I don't know, he made some suggestion, that I should go back there and get underground and represent, but I told him it was difficult for a man to work on any ground unless he felt sure he was going to get paid for it, and he said he would see Archibald about it and we went to the Panama and they left me in a little room for half an hour and then came back and bought me a cigar and then said I should write to Mr. Ellis in Denver, and if Mr. Ellis would recognize me in writing as having a right to pay me these wages, he would be glad to do so, and I told them I couldn't *but* anything at Blum's on that basis, and I put a lien on the property to protect me and protect others.

Q. Have you been paid since then?

A. I have made very satisfactory arrangements since then, yes, sir, but not by Mr. Treat at any time.

Mr. GANTY.—That will be all.

Cross-examination by Mr. RITCHIE.

Q. When did you file this lien?

A. The lien was filed before the thirty days were up, after I left there. [265—223]

Q. When did you quit there?

A. Just prior to Thanksgiving, some time.

(Testimony of John Hughes.)

Q. Thanksgiving, 1914?

A. Yes, sir; Thanksgiving, 1914.

Q. And you filed the lien within thirty days thereafter? A. Yes, sir.

Q. And when were you paid?

A. I don't know—I wrote down to Mr. Ellis at Denver and got the lien satisfied to my satisfaction; that was probably—

Q. You said something about Will Ellis giving you a check?

A. He asked about Will Ellis acting as agent, yes—he gave me a check as his brother's agent; that was for work on Mineral Creek I did for him.

Q. That was for other work? A. Yes, sir.

Q. Mr. Ellis didn't pay you the money—he gave you a lease on part of the Cliff ground. Is that the way the lien was satisfied?

A. We had a kind of business arrangement that was the same as handing the money to me; he couldn't give me the money because he was in Denver and I was here, but it was the same as money to me, exactly.

Q. Then he didn't send you any money?

A. I didn't see Mr. Ellis for months afterwards.

Q. Did he send you any money, or did anybody for him pay you any money?

A. He sent me an order that was the same as money.

Q. What was it?

A. It was an order that I could take the money out of the ground.

(Testimony of John Hughes.)

Q. And in consideration of that you satisfied the lien?

A. Pretty much that way, yes—No, I guess not, I take that back. No, I received a settlement for that afterwards—I didn't consider [266—224] this as a settlement, but I took the money out of the ground and settled it.

Q. That is what we are getting at—we want to know precisely how you were paid. A. Yes, sir.

Q. He gave you a lease on part of the ground and in consideration of that you satisfied the lien?

A. Yes, sir.

Q. And took your money out of the ground?

A. Yes, sir.

Q. (By Mr. GANTY) When you settled up with Mr. Ellis upon this lease that he gave you, did you or did you not deduct from what you gave him the amount that was owing to you for your services?

A. I did.

Witness excused. [267—225]

[Testimony of D. F. Millard, for Defendant.]

D. F. MILLARD, a witness called and sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. GANTY.

(Testimony of D. F. Millard is reduced to a recital, as follows:)

I have been employed in the office of Mr. Lathrop, in Valdez, as bookkeeper, etc., in the steamship company's office and kept the books of the Cliff Mining Company, part of the time. That was about from

(Testimony of D. F. Millard.)

the 28th of May until the 1st of October, 1914. In the course of such employment I made out some statements of royalties and accounts between Mr. Ellis and the Cliff Mining Company. It seems to me that Mr. Lathrop went to your office (Mr. Chas. Ganty's) one day with some statements made up by me and there was some discussion as to the contents of the statement; I think it was regarding royalties—I figured the percentage wrong. [268—226—228]

[Testimony of Charles G. Ganty, for Defendant.]

CHARLES G. GANTY, being first duly sworn, made the following statement:

I wish to state to the Court that I have acted as attorney for Mr. H. E. Ellis and as attorney for Mr. Will Ellis, his brother, and that Mr. H. E. Ellis requested me to act as such attorney for his brother during his absence from Valdez, his brother being in charge of the Cliff mine property and other mining properties of Mr. H. E. Ellis; in fact he informed me that he had turned over all his interests to him to look after in Valdez except the Orpheum Theatre. The statements made by the Cliff Mining Company were brought into my office by Mr. Will Ellis and the first time I noticed a charge for what was called the Archibald portion of patent expense, it was on a statement handed to me by Mr. Lathrop, I think on July 20, 1914, it was handed to me, because I had protested against an office statement which contained a misstatement of the royalties due them, put the royalties due Mr. Ellis at 80% and there had been some

(Testimony of Charles G. Ganty.)

discussion and Mr. Lathrop, I remember, brought in some new statements, that were made out correctly, but it was on or about that time, the 20th of July, that I first saw this charge of patent expense and this other charge of the cost of the Gold Bluff, 80% of the Gold Bluff suit, in fact this is the statement in which the attorney's fee paid to Mr. Bunnell was first stated as a charge against Mr. Ellis.

By the COURT.—Is that the one that Mr. Kraemer said was delivered about April?

A. That is the one—it could not have been made up as long as that.

By the COURT.—Who gave it to you?

A. I believe that Mr. Lathrop brought this one in, because I had a previous discussion; he brought in a bunch of statements at that [269—229] time corrected as he said and we were trying to settle these questions; a good portion of those were burned in the fire but I have here all I retained and the date is definitely fixed in my mind because Will Ellis came in the day after that and I advised him to immediately protest on behalf of his brother to the Cliff Mining Company against their making any such charge or against their allowing Treat, Smith and Archibald to be recognized as owners, through the agency of the Cliff Mining Company, as owners of the property and I wrote a letter and submitted it to Mr. Will Ellis, which Mr. Will Ellis took into the Steamship office and delivered to Mr. Lathrop. I went with him at the time and was outside when Will Ellis went in with this letter and then we went on together down

(Testimony of Charles G. Ganty.)

town. The records of the Cliff Mining Company have been destroyed by fire; I intended to prove this through those records, and all I have now to do is to simply introduce this copy, if I can introduce it. The copy was left in my office and in my care. The original was delivered by Mr. Will Ellis to Mr. Lathrop in the Steamship office and Will Ellis also signed the copy and I retained it.

By the COURT.—Do you know that Mr. Lathrop received it?

A. I handed it to Mr. Will Ellis; after he signed the original he took it into Mr. Lathrop's office. I was going home at the time I saw him go into the Steamship office and saw him deliver the original. I now have the copy and would like to introduce it in evidence.

By the COURT.—Is there any objection to it?

Mr. DONOHOE.—I want to examine it first.

The WITNESS.—And I wish to state to the Court that Mr. H. E. Ellis to my knowledge cannot possibly have had any statement [270—230] from the Cliff Mining Company regarding this Gold Bluff expense until after he came back to Valdez, because the statements were issued to Mr. Will Ellis and were by him, most of them, brought into my office and I have them here at this present time.

By the COURT.—Didn't you consider it a matter in which Mr. H. E. Ellis was interested?

A. Exactly, but we expected Mr. Ellis back at any time—he had been sick and we expected him back at any time. I wrote him one letter urging him to come

(Testimony of Charles G. Ganty.)

back as soon as possible but this was a long time before he finally came back; we expected him back from day to day right along and I was carrying on this thing in the meantime; always waiting for him to come back; I had taken the matter up with the Steamship Company, with Mr. Lathrop, and we had agreed to wait until Mr. Ellis came back before finally settling this thing. I requested permission to see the books of the Cliff Mining Company, we *we* could settle other matters in dispute but that was refused until just lately and that was the reason the thing was held over awaiting Mr. Ellis' return, and I am satisfied that Mr. H. E. Ellis did not know of this claim outside of what he might have known before he left here.

By the COURT.—You never wrote him about it, then?

A. I wrote one letter, stating these matters had come up and urging him to return. The letter was directed to the Ideal Building, Denver, and was returned here for some reason or other—it was returned undelivered; it was written care of a bank in Denver and was returned here unclaimed—I forget the name of the Bank at this time. I had the returned letter which I kept, but that was burned in the fire, but I wrote that to him at his bank address, I remember, and later on I [271—231] got his Ideal Building address, which I think was his proper address. I had forwarded money to Mr. Ellis through the bank, the bank in whose care I wrote to him. That was the only address I had at the time; he had been

(Testimony of Charles G. Ganty.)

roving all over the country and it was difficult to keep track of his address. I did not expect to testify in this matter, I expected to bring this out by the company's own records, but am stating the facts as I know them to be.

Mr. RITCHIE.—We have no objection to this letter going in. The letter offered by Mr. Ganty is marked Defendant's Exhibit #11 and admitted without objection. It reads as follows:

**Defendant's Exhibit No. 11 [Letter, July 22, 1914,
H. E. Ellis to Cliff Mining Co.]**

July 22d. 1914.

Cliff Mining Company,
Valdez, Alaska.

Gentlemen:

Your attention is called to your statement in account with H. E. Ellis, dated July 20, 1914, wherein certain credits are given Mr. Ellis by reason of payments made by Treat, Smith and Archibald, on April 30, 1914, as proportion of patent expense.

On behalf of Mr. H. E. Ellis, I hereby protest against your receiving any money from said parties on such account or any other account or performing any act on behalf of said Ellis that would in any way recognize or tend to recognize any interest or right of said Treat, Smith or Archibald in and to the property now or heretofore leased by the Cliff Mining Company and known as the Cliff Mine. And I hereby notify you that said H. E. Ellis claims the sole and exclusive right of possession and ownership of said Cliff Mine and all of said premises held by you

(Testimony of Charles G. Ganty.)

from the date of the termination and cancellation of the lease under which you held said premises.

Yours respectfully,

H. E. ELLIS,
By W. M. ELLIS,
Agent.

The WITNESS.—I merely wish to set the situation right before the Court to the best of my ability. I know of these things and believe the Court should be informed of them in view of the situation.

By the COURT.—I asked Mr. Ellis about his knowledge of the claim [272—232] in order to give you an opportunity to show why it was he did not get notice *of until* after a year's time?

A. That was exactly the reason—we were simply waiting for him all the time to come back but his sickness dragged on longer than he expected—for one reason or another anyhow he did not come but it was always understood between Mr. Lathrop and myself that we should wait.

Cross-examination by Mr. RITCHIE.

Q. You knew Mr. Ellis' address in Denver all the time?

A. Not all the time—it was after this letter was returned some time, a long time, in Denver, was the bank through which I sent him some money.

Q. You don't know yet how much time he spent in Denver and how much elsewhere?

A. Not to my knowledge. I asked Mr. Will Ellis about it and his brother didn't seem to be exactly informed at all times.

(Testimony of Charles G. Ganty.)

Q. Why did you get that notice from the Cliff Mining Company?

A. It was simply through these statements which were brought to me—it appeared to me there was an opportunity being made to establish an interest in this mining claim and my understanding, from my conversations and my knowledge of the thing generally—I have known the parties for a long time and some of the transactions were so different—I knew that Mr. Ellis claimed an entirely different ownership, he claimed the entire ownership of this property, had done so for years.

Q. Then at the time you wrote this letter, you knew that Mr. Treat and Mr. Smith and Mr. Archibald were claiming an interest?

A. No, I did not, but it aroused my suspicions, in view of this [273—233] proposition; I knew—there had been some talk about it; I had spoken to Mr. Bunnell about it as a matter of fact and I had heard about this lease, I believe, or deed from Smith to Archibald.

Q. Did you ever talk to Mr. Bunnell as much as two years ago about this lease and the possible construction that might be put upon it?

A. I have talked to him—I don't think it was that long ago—it was less than that.

Q. You discussed with him the possibility of a different construction than that contained in it being put upon it? A. Yes, sir.

Q. That although it recites that Mr. Ellis owns four-fifths of that was not binding upon him?

(Testimony of Charles G. Ganty.)

A. 3. I don't remember that particularly, but I remember we discussed the situation right along—Mr. Bunnell was there at the time it was signed; he was a witness.

Q. You have known as attorney for Mr. Ellis and having pretty close knowledge of his affairs, you have known for two years or more that this claim was going to be asserted?

A. No, I can't say that I have, except something like that by reason of the fact that this deed was made—I had been informed about that from a reliable source, about this deed to Archibald, Smith to Archibald, and I didn't doubt at the time but what it *probably lead* to some suit, if Archibald tried to assert his title, if he had any.

Q. After you wrote this letter to the Cliff Mining Company, did you serve any notice on Treat or Archibald? A. No.

Q. Or write to Mr. Smith? [274—234]

A. No, I said nothing at all about it.

Q. Did you write to Mr. Ellis about it?

A. No, I don't think I mentioned that particular point, I believe I told Mr. Will Ellis to be sure to write to his brother and tell him about these details. I haven't had much to say to Mr. H. E. Ellis since he left—I generally corresponded through his brother.

Q. Did you ever tender the money to Mr. Archibald and Mr. Treat, who were in the city here?

A. What money?

Q. The money that you disclaimed the right to in that letter?

A. I never tendered them any money.

Witness excused.

Defendant rests.

Whereupon court adjourned until to-morrow (Thursday) morning at ten o'clock.

Thursday, October 7, 1915.

MORNING SESSION.

Rebuttal.

[Testimony of Edmund Smith, for Plaintiffs (in Rebuttal).]

EDMUND SMITH, recalled as a witness for the plaintiffs, in rebuttal, testified as follows:

Examination by Mr. DONOHOE.

Q. You were present yesterday when Mr. Ellis testified? A. I was.

Q. *Nad* heard his testimony regarding the articles of incorporation that had been prepared for the purpose of incorporating the Mystic Gold Mining Company? A. I did.

Q. You heard him state how those articles came into his possession? A. Yes, sir. [275—235]

Q. Just state to the Court your remembrance of what you did in connection with those Articles of Incorporation and how they were signed?

A. My recollection is just as I testified when I was on the stand, that they were left in the office and I felt just as certain then as I do now that that was the disposition of them and the condition of them looked as if they had been in that back-room.

Q. What did you do with papers that are commonly called dead papers?

(Testimony of Edmund Smith.)

A. Well, if we knew they were absolutely worthless and nothing ever would come up again regarding them, no strict account was taken of them, but most all legal papers in the office were packed away in boxes that we would pick up and secure from the different stores in the town; there were several boxes of these papers, and usually after a term of court or at intervals or when we got to it, matters that were apparently dead would be just gathered up and packed in these boxes and put in the back room or the shed of the building we occupied.

Q. Was that shed protected from the weather to any great extent?

A. No, it was open, the door was nearly always open, we never closed the door day or night—the door facing the bay; the door was open and cracks in it and it leaked in several places.

Q. Did you notice the condition of the covers of the articles of incorporation introduced in evidence?

A. I did.

Q. Comparing that with other papers that have been introduced in this trial as of about the same date, what comparison have you to make?

A. Well, the articles of incorporation are about in the condition I would expect them to be if they had remained in one of those boxes in the office for any length of time, because we frequently [276—236] had to resort to those boxes and dig out different papers and they were exposed to the weather more or less and the dust.

Q. Have you any recollection whatever of giving

(Testimony of Edmund Smith.)

those articles to Mr. Ellis?

A. None whatever; it doesn't seem possible to me that I could have delivered them under the conditions and in the manner designated.

Q. Now I hand you Defendant's Exhibit #9 which purports to be a letter written on the 5th day of June, 1909, addressed to Mr. H. E. Ellis and signed George C. Treat and Edmund Smith and ask you to state the circumstances of the execution of that letter and the intention of the parties who signed it and Mr. Ellis at that time?

A. Well, as to the letter, I had forgotten about the letter and I have no distinct recollection of preparing the letter, but at that time there were two propositions just as Mr. Ellis testified and as Treat and I testified. Mr. Ellis wanted to eliminate us from the property—

Mr. GANTY.—I think this is repetition.

By the COURT.—The letter was brought out by you—He may proceed.

The WITNESS.—(Continuing.) There were two propositions in writing, one was the lease to the property and what royalty we would expect and the other was the amount of money that we would take for our interest in the property and since Mr. Ellis testified about Mr. Crane's suggesting that he could buy us out, why that recalls the fact that there was discussions regarding the purchase of our interests in the property, so I hurriedly prepared this letter on the two propositions—the first paragraph refers to the lease, what royalty we would expect and the

(Testimony of Edmund Smith.)

[277—237] second paragraph is what we would expect for our interest in the property in case of a sale.

Q. As I understand you, your idea at the time that letter was delivered was, that if the ground was leased you would accept 15% royalty notwithstanding you owned 20%.

A. Yes, that was a matter of compromise as I stated the other day.

Q. But in case they wanted to buy your interest, it would then take \$12,500?

A. \$12,500 was the price we fixed on our interest in the property.

Q. And that clause in the letter referring to royalty was not intended to eliminate your interests in the property?

A. Certainly not—I think that is covered by the second paragraph of the letter, referring to a different theory altogether—the theory of leasing and that was carried out in the lease.

Q. You heard Mr. Ellis' testimony yesterday in regard to the fact that some time previous to the 5th day of June, 1909, you and Mr. Treat had agreed that you would abandon the corporation proposition and fall back on your original contract, which was termed the mortgage contract of the 15th of May, 1907—you heard that testimony?

A. I heard that testimony, yes, sir.

Q. State your understanding of that transaction—if there ever was any?

A. There never was any such transaction. The

(Testimony of Edmund Smith.)

proposition of the contract of, I think it was July 9, 1908, was in full force and effect, as understood by all of us, up to the time of the substitution of the lease to Mr. Millard and it was discussed at that time that a 20% interest, 20% of the stock of the corporation, was equivalent to owning 20% of the assets or property of the corporation—that is what we based our 20% [278—238] claim on, that we were willing to make this change and accept 20% interest in the property in lieu of what was practically 25% of the interest in the stock.

Q. Now was that contract of May 15, 1907, which is termed the mortgage contract, ever recorded?

A. It never was, at least I never had it recorded and I can find no record of it.

Q. You have examined the records to see?

A. I have examined the records to see.

Q. Recently?

A. Recently, since the commencement of this trial.

Q. You heard Mr. Ellis' testimony yesterday regarding conversations he had with you concerning a proposition that Mr. Lathrop would come in with yourself, Mr. Ellis and Mr. Treat at the expiration of the Millard lease to operate this property?

A. I heard that testimony, yes, sir.

Q. Just state your remembrance of that conversation and how it happened to come about?

A. I think that was the spring I moved to Seattle, shortly before I left—I am not certain as to the date, however, but while I was in Seattle, just prior to that time I met Mr. Lathrop and we were discussing the

(Testimony of Edmund Smith.)

Cliff matters and Mr. Lathrop suggested that he would like to come in with the owners of the property at the expiration of the lease, providing of course that our relations were pleasant and the property was satisfactory at the time. I took the matter up with Mr. Treat and Mr. Ellis in my office in the city and stated to them what Mr. Lathrop had said and Mr. Ellis said that would be very satisfactory to him, that he had always found Mr. Lathrop a good [279—239] business man and if he had any differences with him, he could always sit down and talk it over and adjust it in an amicable way and the question came up as to the details—we went more into details, and I said to Mr. Ellis that as Mr. Treat and I only owned ten per cent each in the property, if Mr. Lathrop bought any considerable amount, he would have to buy either all of ours or buy principally from Ellis, and Mr. Ellis said, if everything was all right at the expiration of the time, why we would have no difficulty on that ground. This last summer I wrote to Mr. Ellis, after taking the matter up with Mr. Lathrop for the carrying out of that proposition.

Q. And did you get a reply from Mr. Ellis?

A. I never received a reply from him.

Q. In that conversation you spoke about, with Mr. Ellis, did you make any statements that you would buy an interest from Mr. Ellis, so you could come into the deal, in addition to your original interest?

A. We discussed the original interest at that time and I told him if I was financially able to do so that I would like to divide it up into quarters, that we

(Testimony of Edmund Smith.)

would purchase a full portion if we were able to do so and have a close corporation—the object was that just the four of us were to be interested.

Q. That is, in addition to your ten per cent interest you were to buy enough to make yours a quarter?

A. Make it a quarter all around, a quarter each.

Mr. DONOHOE.—That is all.

Witness Excused. [280—240]

Surrebuttal.

[Testimony of H. E. Ellis, for Defendant (in Surrebuttal).]

H. E. ELLIS, recalled, as a witness in surrebuttal, on behalf of defendant, testified as follows:

Examination by Mr. GANTY.

Q. You just heard the testimony of Mr. Smith relative to these articles of incorporation and other papers, state to the Court what you did with those papers after they came into your possession as testified by you the other day?

A. The papers were deposited in the safe in Mr. Ganty's office where they remained until after the fire, when the safe was opened—after the fire recently.

Q. You heard the conversation stated regarding these alleged negotiations with Mr. Lathrop—did any such negotiations occur?

A. Yes, in a way they did.

Q. State your version of what they were, to the Court.

A. The way Mr. Lathrop had often spoken, he

(Testimony of H. E. Ellis.)

would like to be interested in the property itself and if there was any chance, why he would like to get into it after the lease, if there wasn't an extension of the lease to the Cliff Mining Company. He spoke to Mr. Smith about it and Mr. Smith took it up with me one day—I was coming by the office and a clerk he had in the front room called me into the office, as I was coming up the wharf—I was working down the Bay—and he spoke of the matter and as he said, I told him at the time that as far as I knew then, it would be very agreeable to me to have Mr. Lathrop interested in the property in some manner; he put it up this way, that the chances are I wouldn't be in town, probably would want to put in a good deal of time in the States and it would be very convenient for me to have somebody on the ground to look after the property. There never was anything done [281—241] further in that line, though; and in speaking of the interest that Mr. Treat and Mr. Smith were to have, it was understood by me that they were to buy an interest at the same time that Mr. Lathrop did and that it was never understood that I was to own less than 50% interest in the property, never spoken of in any way that I was to own less than 50% interest—that the three of them would probably own the smaller interest—I was to hold control of it.

Q. Was anything said about any interest that they might have at that time continuing?

A. Nothing was said in that line.

(Testimony of H. E. Ellis.)

Cross-examination by Mr. RITCHIE.

Q. When these articles of incorporation were given back to you, as you stated, after signing the Crane contract or the Millard contract, I don't remember which, you gave them to Mr. Ganty, you say, and he put them in his safe?

A. I put them with other papers into Mr. Ganty's safe.

Q. Other papers referring to the same thing?

A. Well, to the Cliff property, and I had a number of other papers and put them in the safe together.

Q. You had a lot of papers referring to the Cliff, several other papers, copy of lease with Mr. Crane and lease with Millard and these articles of incorporation and you put all these together and put them in Mr. Ganty's safe?

A. Yes, they were in the safe.

Q. Where was Mr. Ganty's safe at that time? Mr. Ganty's office? A. It was on the wharf.

Q. The same office he had up to the time of the fire? A. Yes, sir. [282—242]

Q. When Mr. Smith gave you these Articles of Incorporation were they in the same condition they are now—did they look like that? (Showing witness paper.)

A. No, sir, they were not smoked up.

Q. When were these taken out of Mr. Ganty's safe?

A. A day or two following the fire—I don't know just when.

Q. A day or two following the fire?

(Testimony of H. E. Ellis.)

A. A day or two following the fire.

By the COURT.—Were these in the safe at the time of the fire?

Mr. GANTY.—Yes, sir, they were in the fire—you can smell the smoke on them now.

Q. Was this letter also in the safe with the others? (Handing letter.) A. Yes, sir.

Q. Do you smell any smoke on that?

A. I beg your pardon, I made a mistake—this letter was with some private papers I had in the States with me at the time, among some stock that I had taken with me to the States, with some other papers I had in my grip at the time.

(By Mr. GANTY.)

Q. About how long before the fire was it that you gave me these papers? It wasn't right at the time you got them from Mr. Smith, was it?

A. That I gave them to you?

Q. Yes.

A. I didn't turn them over to you until later but they were in the safe all of this time, for a number of years.

Witness excused.

Testimony closed. [283—243]

Friday, October 8, 1915.

MORNING SESSION.

By the COURT.—In this case of Treat and others versus Ellis, I want to ask the parties if they have any objection to opening up the case again for the purpose of asking Mr. Ellis another question and it may be necessary to get the testimony of another

(Testimony of H. E. Ellis.)

witness. I will state the matter plainly to counsel. It is a matter which may aid me in my consideration of the case, in arriving at a better understanding of it and getting at the truth. As I recall it now Mr. Charles G. Debney told me a year or two ago, maybe longer, that some time in the early days of the Cliff mine, Mr. H. E. Ellis offered to sell him an interest or option or lease an interest and he told me the price and terms. Now, I would like to open up the case for the purpose of asking Mr. Ellis if he made such an offer and if there is any difference between his statement of the matter and the fact as told me by Mr. Debney, I would like to have Mr. Debney's testimony, either his deposition or I would be willing to take his word, by wire,—just wire him the question and get his reply and it is a matter I would like to have you agree upon. I feel in matters of this kind or any kind, where there is a doubt that can possibly be cleared up or the truth of the matter arrived at, it is proper to open up a case for such purpose.

Mr. DONOHUE.—We have no objection.

Mr. GANTY.—I have no objection at all.

By the COURT.—An order will be made opening up the case for that purpose only. You may have Mr. Ellis here as soon as it is possible to get him here. I think it might be well if you can agree upon it now before Mr. Ellis is asked this question, if you can agree that Mr. Debney's answer to a telegram may be [284—244] considered as evidence in the case—I suggest this as a means of saving time and

(Testimony of H. E. Ellis.)

expense. I would as soon take his answer to a message as the sworn statement, if you agree to that method of taking it.

Mr. GANTY.—I have no objection to any method that will arrive at the truth of this case.

Mr. DONOHOE.—We have no objection to sending such a telegram at this time and it may be considered as evidence if the Court desires, his answer to the wire.

By the COURT.—I don't know that it will be necessary to send the telegram at all until Mr. Ellis has testified—it may be that his testimony will practically conform to the matters as told me by Mr. Debney. As soon as you get Mr. Ellis here you may call the matter up.

Saturday, October 9, 1915.

MORNING SESSION.

By the COURT.—In this case of Treat et al. vs. Ellis, are you willing to recall Mr. Ellis?

Mr. GANTY.—We are willing to recall Mr. Ellis and if among other things the Court desires information as to what value Mr. Ellis placed upon this property, Mr. Martin was offered an interest in the property in 1907 and we should like to have him examined as to what Mr. Ellis asked him for this interest at that time and for that purpose we ask that the case be reopened for the admission of the testimony of Mr. Martin and Mr. Ellis on that point.

Mr. DONOHOE.—We object to any offer made to Mr. Martin in 1907. If Mr. Martin made the

(Testimony of H. E. Ellis.)

defendant Ellis an offer it would be a different situation, but something Mr. Ellis may have told Mr. Martin, as to what he would take, in 1907, has no bearing on the [285—245] case. This offer made Mr. Debney as I understand it was made about some-time, between the 9th of *of* July, 1908, and the 5th day of June, 1909.

By the COURT.—I don't know what date it was. You can take the stand, Mr. Ellis.

[**Testimony of H. E. Ellis (Recalled by the Court)**].

H. E. ELLIS, recalled—Quotations by the Court.

Q. Mr. Ellis, did you, prior to making the option to Mr. Crane, in June, 1909, offer to sell, option or lease to Mr. Charles G. Debney any interest in the mining claim or claims now known as the Cliff?

A. Yes, sir.

Q. State then about the time this was and what was the offer as to the interest in the mining claims, the price and terms—state about the time as near as you can.

A. The claims were located in August of 1906. I was stopping around the St. Elias Hotel a great deal of the time, Mr. Debney and Mr. Poot were always friends of mine, and a short time after the location of the ground, I had an assay or two on the ground and panned up a lot of the ore—I think I borrowed Mr. Debney's mortar, he had one there at the St. Elias Hotel and I took some of the rock up there and panned it, ground it up and panned it—I didn't have one at home or he had a larger

(Testimony of H. E. Ellis.)

one than I had, and he saw the values I was getting and wanted to know where it came from and all about it, and I told him about finding the ground, that I had just put a shot in it, something of that kind, did very little work on it, and it panned so nicely that he got interested and wanted to know if there was a chance for him to get in on it, and so I believe it was in September, probably, or the month after I discovered the ground, it may have been in August—I am not certain as [286—246] to the exact date, but it was very shortly after I discovered the ground. Mr. Debney went down with me and looked at it and got some samples of it and he took some samples of the quartz and got a very good assay out of it. He only made one assay at that time and got a very good assay, I don't remember but I think it was \$63.20, but I am not positive that that was the assay; and we planned what we would do and what interest I would let him have; he wanted to know what my idea was and I told him that from the little of the ground that I had exposed, the little of the vein that I had exposed, I considered it a very fine prospect and I thought sure it would make a little mine, nothing very big probably, but a nice little property and if I could get a small mill on it, a cheap mill, I considered that the property would develop itself, from what we could take out of it, and so I made him the proposition that if he would give me a thousand dollars in cash and agree to put up a like amount—that I

(Testimony of H. E. Ellis.)

would put this money back into the ground and he was to put up a like amount for the developing of the ground and we would go down there, either he would work with me and we would work on the ground all winter or he should furnish a man to work with me—he was thinking then of going out to the states and he didn't know whether he could go down himself or whether he would have to furnish a man. He said I could pick some good man I knew to go down and work with me all winter and he would pay for it and he would put up this thousand dollars and then in the spring if the ground warranted it, we would expend the rest of this money for a small stamp mill, which we thought we could put up ourselves and run, and then after that, why the thing was to be divided, the expense was to be divided according to our interest in it—[287—247] he was to own one-quarter and I three-quarters.

Q. Do you say he was to give you a thousand dollars? A. A thousand dollars in cash.

Q. And what do you say about a like amount?

A. He was to expend a like amount against my thousand—we were to put the entire two thousand dollars into the ground.

Q. He was to put up two thousand dollars, then?

A. He was to give me a thousand dollars in cash and I was to deposit my thousand and he was to deposit the same amount in the bank to be expended in development.

Q. And what interest was he to have then—you

(Testimony of H. E. Ellis.)

say a quarter? A. A one-quarter interest.

Q. It wasn't a half interest?

A. No, sir, a one-quarter interest.

Q. Did Mr. Debney get a number of assays made after that?

A. No, not to my knowledge, he did not. A little later he went down again—we went down in the forenoon and had lunch down at my camp there and looked over the ground—we planned where we would get our little stamp-mill, where we would put up a little shack to live in that winter, if we stopped there and got to work and he took an assay—I think we either put in the second or third shot that had been put into the ground while he was there and drew out some fresh rock and broke into the wall rock quite a little bit and in the wall rock was quite a lot of fine iron, in the hanging wall, it was all impregnated with iron and he thought that ought to carry values for three or four feet in width and I think he took an assay, including the six or eight inches of quartz, which was the size of the vein there, and also this impregnated slate on the left side.

Q. Do you know of his having taken about that time a considerable [288—248] number of assays, say five or six or seven or eight or nine or ten, something like that?

A. No, I do not—he brought up some more rock, but that was the only assay he took of the ground that I know of—I think that was his second one, which ran very low.

(Testimony of H. E. Ellis.)

Q. He didn't agree to accept your offer, then?

A. No, while he and Mrs. Debney were discussing the thing, after their first assay, which ran very good, I think, \$60, they were so much disappointed in this next one that they were rather afraid to put up their money. Mr. Debney had just sold out his interest in the St. Elias and he told me he had four thousand dollars that he would like to invest in some property that he thought would make good, but he didn't want to put into anything where he would stand too much of a chance of losing, but was willing to put up half in a proposition of that kind. The ground was not opened up at that time and in fact the best showing had not been discovered then and was not until after Mr. Debney had gone out that fall—latter in the fall, I found the richer showings further up; it was exposed a possible distance of probably from forty to sixty feet down in the lower part of the little gulch along-side the mill there, about where the roof of the lower tunnel would be, forty or sixty feet further up, down lower. It was covered with broken stuff, very deep, that had slid down to the gulch and was all covered with willow brush, hadn't been cut out. We climbed out among the alders and got up to the showing—you couldn't see it from the beach at that time, and we just dug into it, it was almost all pick work. We had a little set of drills, five or six of them, probably, three-quarter steel I carried around with me and I put in one shot—[289—249] and then would

(Testimony of H. E. Ellis.)

have to bring my tools back to Valdez and get them sharpened up—about all they could stand was one drill, that small steel.

(By Mr. GANTY.)

Q. Mr. Debney left in the fall after looking at the property?

A. Yes, Mr. Debney went out to the states a short time after this—I couldn't say how long.

Q. Did you later on receive a communication from Mr. Debney? A. Yes, sir.

Mr. GANTY.—I desire to introduce this letter in evidence, as it tends to fix the date of the negotiations between Mr. Ellis and Mr. Debney.

Mr. DONOHOE.—We object to the introduction of the letter on the ground that it is wholly incompetent being between Mr. Ellis and an outside party

By the COURT.—There is nothing in the letter that affects the case and it does tend to fix the negotiations between Ellis and Debney—it is admitted.

Plaintiffs allowed an exception to the ruling.

The letter is marked Defendant's Exhibit #12, admitted in evidence and reads as follows:

Defendant's Exhibit No. 12 [Letter, February 11, 1907, C. G. Debney to "Friend Red"].

San Diego, Feb. 11th, 1907.

Friend Red:

Thought I would let you know we are leaving Seattle on the "Saratoga" March 4, '07, so if you wanted anything you could let us know by letter to the Rainer Grand Hotel. Hope you haven't sold

the gold prospect; would like another try at it. Did old George fix the launch up and use her this winter? You might ask him if he wants me to bring anything up from Seattle for him. Didn't get to the mining college this winter, Red, but am going to plug pretty hard next summer, so I can go another [290—250] winter. Was going to write to Gus Brown and ask him if he wanted anything from below. You might save me the trouble by telling him that I have written to you.

Wasn't I the lucky Swede to sell out of the St. Elias? Poor old Poot had the chance to sell out after I did and could have gotten \$1,000.00 more. I told him at the time he should have sold. If you haven't outlined definitely what you are going to do next summer, Red, would like to make the same proposition to you that I made for last summer. There never will be a better time to sell copper properties than next summer. If the price of copper goes much higher, they'll surely find a substitute. So let's start early, Red, and get hold of something on Knight's Island near the water. You know I am pretty good at judging whether a prospect is worth doing work on or not.

I have an English Co. and two California crowds who have told me they will buy anything I have that looks good. If you will go in with me for next summer, Red, I'll make you some money sure. Maybe I'll make enough so we both can go to Freiburg for all next winter. Maybe you think I'M over sanguine, Red, but I'm not. I can see the opportunity

(Testimony of H. E. Ellis.)

so plainly that I have been anxious all winter for summer to come so I could get to work. Such an opportunity as I see does not come to us often, so let us take advantage of it while we have the chance.

Let me hear from you at Seattle anyway, Red. Mrs. Debney and I are now going to take a swim. It's been so hot here that we have been in the water almost every day for the past week. She joins me in regards.

Yours truly,

C. G. DEBNEY.

Q. State to the Court the extent of the discovery which you state that you made after you showed this property to Mr. Debney.

A. The same fall, I think it was, after Mr. Debney had gone to the States, I went further up the hill, probably a distance of 100 feet above this first discovery. It was very thick brush in there and all kinds of devil clubs and was hard to get there and it was off a little to the right where I consider the vein ran that I discovered an outcrop of quartz sticking up two and a half or three feet above the surface of the ground, among the heavy leaves, which hid it during the summer, but after the frost stuck and killed that stuff, it showed up much easier and I found this quartz sticking up there, five or six feet in length and standing up there above [291—251] the ground two or three feet deep and I broke chunks of it off and found it was very rich, some of the richest quartz I found on the ground.

By the COURT.—That was before you made the

(Testimony of H. E. Ellis.)

first agreement with Treat and Smith, was it?

A. Yes, that was in the fall of 1906.

Q. This letter that has been admitted in evidence, Defendant's Exhibit #12—that is the letter you received from Mr. Debney?

A. Yes, sir, that is the letter I received from Mr. Debney.

Mr. RITCHIE.—Although this letter has been admitted, I desire *to it* further on the ground that there is no statement in the letter which refers to this conversation or proposed agreement between Ellis and Debney, and it simply rests after all on Mr. Ellis' own testimony. He says that his contemplated arrangement with Debney was prior to the date of this letter but this letter makes no reference to any discussion they had about the cliff property. It rests wholly on Mr. Ellis' word that it was prior to this letter—it is a self-serving declaration.

By the COURT.—The letter will be admitted merely for the purpose of showing about the time of this transaction with Debney. Plaintiffs allowed an exception to the ruling.

Q. The gold prospect referred to, was that the property in controversy in this case?

A. Yes, it was.

(By Mr. DONOHOE.)

Q. What results did Mr. Debney get from his samples taken on this property during the time this deal was pending between you and him?

A. Mr. Debney had one assay made which I think

(Testimony of H. E. Ellis.)

went \$63.20, I am [292—252] not positive of the exact amount but something in that neighborhood, I believe.

Q. What other assays did he have made?

A. He had one assay made of quartz and country rock, probably a width of six to eight inches of quartz, in the neighborhood of two feet of the country rock alongside, which went very low, possibly ten or twelve dollars, I don't know.

Q. Don't you know as a matter of fact that his

Q. That it went six dollars?

A. Possibly it only went six dollars, but I don't know that.

Q. Didn't he tell you so?

A. He told me possibly at the time.

Q. That it went six dollars?

A. No, I don't say that—he possibly told me what it went, but I don't know what it amounted to, but it was very low.

Q. Wasn't that assay taken from the breast of the tunnel after the shipment was made to the Selby Smelter? A. No, sir.

Q. There was no tunnel there at the time?

A. There was no tunnel there at the time or sign of a tunnel.

Q. Now, you say that Mr. Debney offered you, or you offered to sell to Mr. Debney a quarter interest in the property for a thousand dollars, is that right?

A. For a thousand dollars, with the stipulation or agreement that he was to put up the same amount

(Testimony of H. E. Ellis.)

in the bank to be used for the development of the property and the putting of a small stamp-mill on the ground, which we thought could be put there for \$1,500.

Q. How much was Mr. Debney to pay for the quarter interest?

A. He was to pay a thousand dollars for the quarter interest, with this work, a man to work with me during the winter, and a [293—253] thousand dollars to be put up against my thousand dollars, which he was to pay me, for the putting up of this stamp-mill and this development.

Q. Can't you estimate what this quarter interest would cost Mr. Debney under your proposition?

A. It would cost him probably two thousand dollars and a winter's work.

Q. He would get one-quarter of that back, having his quarter of the property improved by it, would he not?

A. I don't know what he would have gotten back, but his quarter of the property would be improved by it.

Q. His quarter of the property would be improved by it? A. It surely would.

Q. Then he was to put two thousand dollars into the development of the property for a quarter interest in it?

A. He was to pay me a thousand dollars in cash.

Q. And you were to put that back into the property? So for his share he was to get two thousand

(Testimony of H. E. Ellis.)

dollars worth of development and a quarter interest in the property?

A. You can make your own calculations. I have told you to the best of my ability.

Q. You were to put up all of this thousand dollars he was to pay you back into the property—you were not to keep any of that for your private use?

A. I was to put that in the bank to be drawn on for the development of this property.

Q. And Mr. Debney was to put up another thousand? A. That was the understanding.

Q. Now, is it not a fact that after this shipment was made to the Selby smelter and this tunnel was driven a short distance, you offered Mr. Debney a quarter interest in the property for [294—254] a thousand dollars cash and he was to turn in for the use of the property a small launch that he had in Valdez Bay and before the deal was closed he went down there and took samples from the breast of the tunnel and got an assay of six dollars a ton and refused to go in on your deal?

A. I never made Mr. Debney any such proposition.

Q. You never made him any proposition *by* the proposition that you have testified to?

A. The proposition I have reference to.

Q. You never made him any proposition on the property excepting the one you have testified to?

A. I may have made a proposition to him afterwards, but it was on different terms altogether.

(Testimony of H. E. Ellis.)

Q. What proposition did you make him afterwards?

A. I don't remember having made any—I don't particularly remember having made any proposition.

Q. The only proposition you have any recollection of ever making him on that property was the one you have testified to?

A. I remember making him a proposition in 1906 which I have just spoken about.

Q. Do you remember ever making him another proposition with reference to that property?

A. I can't recall at present—it is possible I may have done so.

Q. To the best of your recollection you never made him any proposition but the one you have testified to, in the fall of 1906?

A. That is the only one I remember at present.

Q. You remember nothing since then, of another proposition?

A. I remember nothing since then of another proposition.

Mr. DONOHUE.—That's all.

By the COURT.—I would like to hear from Mr. Debney on this matter. [295—255]

(By Mr. GANTY.)

Q. Who was present while you were negotiating with Mr. Debney, if anybody?

A. Mrs. Debney was there most of the time.

Mr. GANTY.—And I understood the money was

(Testimony of H. E. Ellis.)

in her name and she was to put up the money for this proposition.

By the COURT.—Do you want to have both of their statements then?

Mr. GANTY.—I would much prefer it.

Mr. DONOHOE.—I would like to state to the Court at this time so as to be clear on this matter, that we knew something of this Debney testimony on advance, knew there were some statements about it; about two months ago I wrote to Mr. Smith in Seattle to get into communication with Mr. Debney and ascertain what he knew. Mr. Smith received a letter from Mr. Debney—the letter is now in Seattle—in which Mr. Debney in rather an indefinite way stated the terms of the sale and said that he would rather be left out of the matter, as he was a friend of Red's and he didn't want to give his deposition in the case. We didn't believe the testimony was of sufficient importance to warrant the taking of this deposition, when he requested as a favor not to be required to testify in the case and for that reason we let it go by. I want to make that statement to explain why we didn't have that testimony here.

By the COURT.—I can understand how Mr. Debney's statement or testimony might not be important or might not be admissible even, but in considering this case yesterday I recalled a statement Mr. Debney made to me a year or two ago and it struck me it might have some bearing and might tend to throw some light on this matter, that is the reason I brought it up.

(Testimony of H. E. Ellis.)

Mr. GANTY.—If it would throw any light on the matter we are willing that Mr. Martin should testify.

[296—256]

By the COURT.—This matter of Mr. Debney's would be admissible, if admissible at all, upon the theory of admission against interest, which is always admissible, but a statement in interest is necessarily self-serving and would throw no light on it. The whole theory of these matters is that a statement against the interest of the witness or a party in action is admissible—for that reason—he might have made offers to a dozen different people that would not be admissible; for that reason I don't feel that Mr. Martin's testimony would be any aid in the case.

The WITNESS.—At the time that Mr. Debney took this second assay of his, it was the day that the "Oregon" was wrecked on Hinchinbrook Island and Mr. Debney and I were coming back in a little launch I owned and when we got to the Three Way Light, why the light had gone out and we didn't have a light on the boat, and when we got near the Swanitz dock, one of the revenue cutters was tied up there and I think one was tied up at the Valdez dock and they started out from the docks at that time without their lights, without any lights out at all, so we couldn't locate their position and we were very much afraid they might run us down. Mr. Debney will surely remember that because we were both very much frightened to be out in the path of those two boats and not knowing their location and they not being able to see ours.

By the COURT.—He no doubt will be able to fix the time approximately.

It was finally stipulated and agreed between the parties and attorneys in the case that the following telegram be sent to Mr. Debney, his answer when received to be considered as evidence in the case:
[297—257]

[Telegram, October 9, 1915, F. M. Brown, Judge, to Charles G. Debney.]

Valdez, Alaska, October 9, 1915.

Charles G. Debney,

1749 Cahuenga St.,

Hollywood, Los Angeles, California.

Prior to June nineteen hundred nine did H. E. Ellis offer to sell option or lease any interest in the Cliff mine to you? If so state about the time, what interest you were to have and the price and terms. Answer by wire collect and mail your and Mrs. Debney's affidavits in full at once.

F. M. BROWN,

Judge.

This telegram was forwarded and the following reply received:

[Telegram, Chas. G. Debney to Judge Fred M. Brown.]

Los Angeles, Cal., Oct. 11-12, 1915.

Judge Fred M. Brown,

Valdez, Alaska.

The day steamship "Oregon" wrecked on Hinchinbrook H. E. Ellis offered to sell me one quarter interest in Cliff mine for one thousand dollars cash and

my launch worth five hundred dollars. Mailing affidavits.

CHAS. G. DEBNEY.

Later an affidavit was received from Mr. Debney to the same effect, copy of which is attached hereto and made a part hereof. [298—258]

I do hereby certify that I am the Official Court Reporter for the District Court, Territory of Alaska, Third Division; that as such I reported the proceedings had in the above-entitled cause, to wit,—George C. Treat, Edmund Smith and Logan Archibald versus H. E. Ellis, being Case #721 of the records of said court; that the above transcript is a full, true and correct transcript of the evidence introduced and proceedings had at the trial of said cause.

Dated at Valdez, Alaska, December 31, 1915.

(Signed) I. HAMBURGER. [299—259]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Petition for Appeal.

To the Honorable Fred M. Brown, District Judge,
the above-named H. E. Ellis, defendant in the above-

entitled cause, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 16th day of October, A. D. 1915, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and he prays that his appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and document upon which said decree was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of him be made.

CHAS. G. GANTY,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 14, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [300]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 16th day of October, 1915.

I.

That the above-named District Court erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause.

II.

That the above-named District Court erred in denying the motion of the defendant and appellant to strike parts of plaintiffs' complaint filed in said cause.

III.

That the above-named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made in open court at the close of plaintiff's case, over the objection and exception of defendant, in the manner following: By striking out from paragraph VI of said complaint the words "hold said contract of July 9, 1908, in abeyance and" for the reason that such amendment was prejudicial to defendant in the trial of this cause and the variance between the proof offered by plaintiffs and said complaint is so great as to be fatal to the cause of said plaintiffs. [301]

IV.

That the above-named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made in open court at the close of plaintiff's case, over the objection and exception of defendant, in the manner following: By striking out from paragraph VI of said complaint the words "At which time defendant specifically agreed verbally to and with plaintiffs Treat and Smith at the termination of said lease he would join Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and would carry out all of the terms of said contract to be performed by him thereunder, or, that he, defendant, would deed to each of plaintiffs Treat and Smith an undivided one-tenth interest in and to each and all of said mining claims," for the reasons before stated.

V.

That the above-named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from paragraph XIII of said complaint the words "the plaintiffs herein have been ready, able and willing to perform all of the matters and things to be performed by them, pursuant to the contract of July 9, 1908, heretofore set out, but" for the reasons above stated.

VI.

That the above-named District Court erred in allowing plaintiffs' motion to amend their complaint

in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from paragraph XIII of said complaint the words "to join plaintiffs in the organization of said corporation, or" for the reasons above stated. [302]

VII.

That the above-named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from said complaint, from the first paragraph of the prayer thereof, the followings words: "specifically perform the contract of July 9, 1908, set out in the fifth paragraph of this complaint, or that he" for the reasons above stated.

VIII.

That the above-named District Court erred in denying the motion of defendant and appellant for a dismissal of this action by reason of the failure of plaintiffs to offer sufficient evidence to sustain their pleadings; which said motion, ruling of said Court and exception of defendant and appellant thereto, appear upon the record in said cause.

IX.

That the above-named District Court erred in overruling defendant's objection and exception to the findings of fact and conclusions of law of the Court herein, for the reason that the same are against the law and contrary to the law and against the evidence and not supported by the evidence, and

not justified by the evidence, and for the reason that there is not any evidence to support the same or any part of the same.

X.

That the above-named District Court erred in rendering and making it's final decree and judgment herein for the reason that the same was against the law and contrary to the law, and unsupported by the facts of the evidence, not justified by the evidence, and for the reason that there is no evidence to support the same.

Wherefore the appellant prays that the said judgment and decree be reversed and that said District Court for the [303] Territory of Alaska, Third Division, be ordered to enter a decree reversing the decision of the lower court in said cause.

CHAS. G. GANTY and

T. C. WEST,

Attorneys for Appellant.

[Endorsed as follows]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 14, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[304]

[Order Allowing Appeal.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

On motion of Chas. G. Ganty, Esq., solicitor and counselor for defendant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the *the* record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed at the sum of \$1,000.

Done in open court this 23 day of February, 1916.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 23, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 486. [305]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, H. E. Ellis, as principal, and National
Surety Company, a corporation, as surety, are held
and firmly bound unto Geo. C. Treat, Edmund Smith
and Logan Archibald, above-named plaintiffs in the
sum of one thousand dollars, lawful money of the
United States of America, for which payment well
and truly to be made we bind ourselves, our succes-
sors and heirs, executors and assigns, jointly and
firmly by these presents.

Sealed with our seals and signed by us and each of
us this 23d of February, 1916.

The condition of the above obligation is such that
whereas, the above-named principal, H. E. Ellis, has
appealed from a judgment rendered and entered in
the above-entitled cause in the District Court for the
Territory of Alaska, Third Division, in favor of the
plaintiff and against the defendant on the 16th day
of October, 1915, and whereas the defendant has ap-
pealed from said judgment to the Circuit Court of

Appeals for the Ninth Circuit, and should said judgment be affirmed in favor of the above-named plaintiffs and against the above-named defendant, and should the above-named defendant pay all costs and disbursements of said plaintiffs and each of them legally taxed against said defendant in said cause, then this obligation to be void; otherwise to remain in full force and virtue.

H. E. ELLIS,

Principal.

NATIONAL SURETY COMPANY,

[Seal]

By JOS. L. REED,

Attorney in Fact.

By T. P. GERAGHTY,

Attorney in Fact. [306]

United States of America,
Territory of Alaska,—ss.

Jos. L. Reed, first being duly sworn, deposes and says: That I am the authorized agent of the National Surety Company, a corporation, and make this affidavit in it's behalf; and further say, on information and belief, that the said National Surety Company has complied with the provisions of an Act relative to bail and recognizance, etc., approved April the 29th, 1915, and the laws of the United States and of the Territory of Alaska.

JOS. L. REED.

Subscribed and sworn to before me this 23d day of February, 1916.

[Notarial Seal]

CHAS. G. GANTY,

Notary Public for Alaska.

My commission expires October 21, 1917.

The within bond is hereby approved both as to matter and as to form, this 23d day of February, A. D. 1916.

FRED M. BROWN,

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 23, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

*In the District Court for the Territory of Alaska,
Third Division.*

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

Citation on Appeal.

United States of America,—ss.

The United States of America to Geo. C. Treat, Edmund Smith and Logan Archibald, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 24th day

of March, A. D. 1916, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the Territory of Alaska, Third Division, from a final decree signed, filed, and entered on the 16th day of October, 1915, in that certain suit, being in equity No. 721 wherein H. E. Ellis is appellant, and you and each of you are respondents and appellees, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable FRED M. BROWN, United States District Judge for the Territory of Alaska, Third Division, this 23 day of February, 1916, and of the Independence of the United States the one hundred and fortieth.

[Official Seal] FRED M. BROWN,
U. S. District Judge for the Territory of Alaska,
Third Division.

Attest: ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 23, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [307]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEORGE C. TREAT, EDMUND SMITH and LO-
GAN ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

**Stipulation Specifying Contents of Bill of
Exceptions.**

It is hereby stipulated by counsel for the parties respectively in the above-entitled cause that the following shall constitute the Bill of Exceptions on Appeal to the Circuit Court of Appeals, to wit:

1. Complaint of Plaintiffs.
2. Motion to Strike Portions of Plaintiff's Complaint.
3. Minute Order on Motion to Strike Portions of Complaint.
4. Demurrer to Plaintiffs' Complaint.
5. Minute Order Overruling Demurrer to Said Complaint.
6. Answer of Defendant.
7. Motion to Strike Portions of Said Answer.
8. Order on Plaintiff's Motion to Strike Portions of Answer.
9. Reply.
10. Decision (Opinion of Court).

11. Findings of Fact and Conclusions of Law.
12. Decree.
13. Order Extending Time to File Bill of Exceptions to February 15th, 1916.
14. Order Extending Time to File Bill of Exceptions to February 25th, 1916.
15. Stipulation as to Record, Abbreviating Exhibits. [308]
16. Transcript of Evidence, Bill of Exceptions Including All Testimony.
17. Petition for Appeal and Assignments of Error.
18. Order Allowing Appeal and Fixing Amount of Bond.
19. Bond on Appeal.
20. Citation.
21. This Stipulation.
22. Order Allowing, Certifying and Settling Bill of Exceptions.
23. Order Directing Forwarding of Defendant's Exhibits Nos. 1-2-3-4 to Circuit Court of Appeals.

DONOHUE & DIMOND and
LYONS & RITCHIE,

Attorneys for Plaintiffs and Appellees.

CHAS. G. GANTY,

Attorney for Defendant and Appellant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 15, 1916. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [309]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH AND LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

**Order Directing Forwarding of Defendant's Exhibits
Nos. 1, 2, 3 and 4.**

This matter coming on regularly to be heard on motion of Chas. G. Ganty, Esquire, Attorney for the above-named defendant, and plaintiffs herein being represented by their attorneys Messrs. Donohoe & Dimond and Lyons & Ritchie; and said plaintiffs by their said attorneys having consented thereto; and sufficient cause having been shown to the Court therefor;

IT IS HEREBY ORDERED that Defendant's Exhibits Nos. 1, 2, 3 and 4 be forwarded by the clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit for the purposes of physical examination by said Appellate Court in the hearing on appeal of the above-entitled cause.

Done in open court this 23 day of February, 1916.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Feb. 23, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 486. [310]

[Defendant's Exhibit No. 1—Articles of Incorporation of the Mystic Gold Mining Co., Dated July 21, 1908.]

ARTICLES OF INCORPORATION

of the

MYSTIC GOLD MINING COMPANY.

KNOW ALL MEN BY THESE PRESENTS:

That we, George C. Treat, H. E. Ellis and Edmund Smith, have this day associated ourselves together for the purpose of forming a corporation under the laws of the Territory of Alaska.

AND WE HEREBY CERTIFY:

FIRST.

That the name of said corporation is the MYSTIC GOLD MINING COMPANY.

SECOND.

That the purposes for which same is formed are: To carry on the business of mining and reducing ores; to buy, sell, lease and operate mines and mining properties; to erect, buy, sell, operate smelters, stamp-mills, and any and all kinds of reduction works; to buy, sell, operate steamships and all kinds of water craft; to build, construct, operate, lease, buy and sell railroads; to acquire, hold, buy sell and exchange real estate and personal property either on its own account or on consignment and commission; to operate and conduct stores and handle all kinds of

merchandise either on its own account or on consignment of commission and to engage in any and all kinds of manufacturing.

THIRD.

That the place where its principal business is to be transacted shall be at Valdez, Alaska.

FOURTH.

That said corporation shall commence on the 21st day of July, 1908, and continue for fifty years.

FIFTH.

That the number of its board of directors shall be [311] three, and that H. E. Ellis, George C. Treat and T. E. Dougherty shall constitute its first board of directors, and shall hold their office until the next stockholders' meeting.

SIXTH.

That the amount of the capital stock of said corporation shall be two hundred thousand (200,000) dollars, divided into two hundred thousand (200,000) shares of the par value of one (\$1.00) dollar per share, and that said stock shall be paid for at par either in cash, property or services.

SEVENTH.

That the highest amount of indebtedness of which said corporation shall at any time be subject shall be fifty thousand (\$50,000) dollars.

EIGHTH.

That the government of said corporation shall be vested in its board of directors who may elect such officers and appoint such agents, giving them such power and authority as it may deem proper. Such

board of directors shall be elected annually at such time as may be *perscribed* by the by-laws.

NINTH.

That the board of directors shall elect a president, vice president, secretary and treasurer with the usual powers of such officers, and such additional power and authority as said board may confer on such officers, and they shall be elected annually and hold their respective offices until their successors are elected and qualified.

IN WITNESS WHEREOF, we have hereunto set our hands this 21st day of July, 1908.

In presence of.—

~~B. B. Lockhart.~~

~~Geo. C. Treat.~~ (Seal)

~~H. E. Ellis.~~ (Seal)

~~Edmund Smith.~~ (Seal)

[312]

United States of America,
Territory of Alaska,—ss.

BE IT REMEMBERED, that on this 21st day of July, 1908, before me, the undersigned notary public in and for the Territory of Alaska, personally appeared H. E. Ellis, George C. Treat and Edmund Smith, known to me to be the persons described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that they signed and sealed the same of their own free act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed my official seal the day and year first above written.

[Seal]

B. B. LOCKHART,
Notary Public. [313]

[Defendant's Exhibit No. 2—Articles of Incorporation of Mystic Gold Mining Co., Dated July 21, 1908.]

ARTICLES OF INCORPORATION

of the

MYSTIC GOLD MINING COMPANY.

KNOW ALL MEN BY THESE PRESENTS:

That we, George C. Treat, H. E. Ellis and Edmund Smith, have this day associated ourselves together for the purpose of forming a corporation under the laws of the Territory of Alaska.

AND WE HEREBY CERTIFY:

FIRST.

That the name of said corporation is the MYSTIC GOLD MINING COMPANY.

SECOND.

That the purposes for which same is formed are; To carry on the business of mining and reducing ores; to buy, sell, lease, and operate mines and mining properties; to erect, buy, sell, operate smelters, stamp mills, and any and all kinds of reduction works; to buy, sell, operate steamships and all kinds of water craft; to build, construct, operate, lease, buy and sell railroads; to acquire, hold, buy, sell and exchange real estate and personal property either on its own account or on consignment and commission; to operate and conduct stores and handle all kinds

of merchandise either on its own account or on consignment or commission, and to engage in any and all kinds of manufacturing.

THIRD.

That the place where its principal business is to be transacted shall be at Valdez, Alaska.

FOURTH.

That said corporation shall commence on the 21st day of July, 1908, and continue for fifty years.

FIFTH.

That the number of its board of directors shall be [314] three, and that H. E. Ellis, George C. Treat and T. E. Dougherty shall constitute its first board of directors, and shall hold their office until the next stockholders meeting.

SIXTH.

That the amount of the capital stock of said corporation shall be two hundred (200,000) dollars, divided into two hundred thousand (200,000) shares of the par value of one (\$1.00) dollar per share, and that said stock shall be paid for at par either in cash, property or services.

SEVENTH.

That the highest amount of indebtedness of which said corporation shall at any time be subject shall be fifty thousand (\$50,000) dollars.

EIGHTH.

That the government of said corporation shall be vested in its board of directors who may elect such officers and appoint such agents, giving them such power and authority as it may deem proper. Such board of directors shall be elected annually at such

time as may be perscribed by the by-laws.

NINTH.

That the board of directors shall elect a president, vice-president, secretary and treasurer with the usual powers of such officers, and such additional power and authority as said board may confer on such officers, and they shall be elected annually and hold their respective officers until their successors are elected and qualified.

IN WITNESS WHERTOOF, we have hereunto set our hands this 21st day of July, 1908.

In presence of.—

B. B. Lockhart.

Geo. C. Treat. (Seal)

H. E. Ellis. (Seal)

Edmund Smith. (Seal)

[315]

United States of America,
Territory of Alaska,—ss.

BE IT REMEMBERED, that on this 21st day of July, 1908, before me, the undersigned notary public in and for the Territory of Alaska, personally appeared H. E. Ellis, George C. Treat and Edmund Smith, known to me to be the persons described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that they signed and sealed the same of their own free act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

B. B. LOCKHART,
Notary Public. [316]

**[Defendant's Exhibit No. 3 — Articles of
Incorporation of Mystic Gold Mining Co.,
Dated July 21, 1908.]**

ARTICLES OF INCORPORATION

of the

MYSTIC GOLD MINING COMPANY.

KNOW ALL MEN BY THESE PRESENTS:

That we, George C. Treat, H. E. Ellis and Edmund Smith, have this day associated ourselves together for the purpose of forming a corporation under the laws of the Territory of Alaska.

AND WE HEREBY CERTIFY:

FIRST.

That the name of said corporation is the **MYSTIC GOLD MINING COMPANY.**

SECOND.

That the purposes for which same is formed are; To carry on the business of mining and reducing ores; to buy, sell, lease and operate mines and mining properties; to erect, buy, sell, operate smelters, stamp mills, and any and all kinds of reduction works; to buy, sell, operate steamships and all kinds of water craft; to build, construct, operate, lease, buy and sell railroads; to acquire, hold, buy, sell and exchange real estate and personal property either on its own account or on consignment and commission; to operate and conduct stores and handle all kinds of merchandise either on its own account or on consignment of commission, and to engage in any and all kinds of manufacturing.

THIRD.

That the place where its principal business is to be transacted shall be at Valdez, Alaska.

FOURTH.

That said corporation shall commence on the 21st day of July, 1908, and continue for fifty years.

FIFTH.

That the number of its board of directors shall be [317] three, and that H. E. Ellis, George C. Treat and T. E. Dougherty shall constitute its first board of directors, and shall hold their office until the next stockholders meeting.

SIXTH.

That the amount of the capital stock of said corporation shall be two hundred thousand (200,000) dollars, divided into two hundred thousand (200,000) shares of the par value of one (\$1.00) dollar per share, and that said stock shall be paid for at par either in cash, property or services.

SEVENTH.

That the highest amount of indebtedness of which said corporation shall at any time be subject shall be fifty thousand (\$50,000) dollars.

EIGHTH.

That the government of said corporation shall be vested in its board of directors who may elect such officers and appoint such agents, giving them such power and authority as it may deem proper. Such board of directors shall be elected annually at such time as may be prescribed by the by-laws.

NINTH.

That the board of directors shall elect a president, vice president, secretary and treasurer with the usual powers of such officers, and such additional power and authority as said board may confer on such officers, and they shall be elected annually and hold their respective offices until their successors are elected and qualified.

IN WITNESS WHEREOF, we have hereunto set our hands this 21st day of July, 1908.

In presence of.—

~~B. B. Lockhart.~~

~~Geo. C. Treat.~~ (Seal)

~~H. E. Ellis.~~ (Seal)

~~Edmund Smith.~~ (Seal)

[318]

United States of America,
Territory of Alaska,—ss.

BE IT REMEMBERED, that on this 21st day of July, 1908, before me, the undersigned notary public in and for the Territory of Alaska, personally appeared H. E. Ellis, Geo. C. Treat and Edmund Smith, known to me to be the persons described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that they signed and sealed the same of their own free act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

B. B. LOCKHART,
Notary Public. [319]

**[Defendant's Exhibit No. 4 — Articles of
Incorporation of Mystic Gold Mining Co.,
Dated July 21, 1908.]**

**ARTICLES OF INCORPORATION
of the**

MYSTIC GOLD MINING COMPANY.

KNOW ALL MEN BY THESE PRESENTS:

That we, George C. Treat, H. E. Ellis and Edmund Smith, have this day associated ourselves together for the purpose of forming a corporation under the laws of the Territory of Alaska.

AND WE HEREBY CERTIFY:

FIRST.

That the name of said corporation is the MYSTIC GOLD MINING COMPANY.

SECOND.

That the purposes for which same is formed are; To carry on the business of mining and reducing ores; to buy, sell, lease and operate mines and mining properties; to erect, buy, sell, operate smelters, stamp mills, and any and all kinds of reduction works; to buy, sell, operate steamships and all kinds of water craft; to build, construct, operate, lease, buy and sell railroads; to acquire, hold, buy, sell and exchange real estate and personal property either on its own account or on consignment and commission; to operate and conduct stores and handle all kinds of merchandise either on its own account or on consignment of commission, and to engage in any and all kinds of manufacturing.

THIRD.

That the place where its principal business is to be transacted shall be at Valdez, Alaska.

FOURTH.

That said corporation shall commence on the 21st day of July, 1908, and continue for fifty years.

FIFTH.

That the number of its board of directors shall be [320] three, and that H. E. Ellis, George C. Treat and T. E. Dougherty shall constitute its first board of directors, and shall hold their office until the next stockholders meeting.

SIXTH.

That the amount of the capitol stock of said corporation shall be two hundred thousand (200,000) dollars, divided into two hundred thousand (200,000) shares of the par value of one (\$1.00) dollar per share, and that said stock shall be paid for at par either in cash, property or services.

SEVENTH.

That the highest amount of indebtedness of which said corporation shall at any time be subject shall be fifty thousand (\$50,000) dollars.

EIGHTH.

That the government of said corporation shall be vested in its board of directors who may elect such officers and appoint such agents, giving them such power and authority as it may deem proper. Such board of directors shall be elected annually at such time as may be prescribed by the by-laws.

NINTH.

That the board of directors shall elect a president, vice president, secretary and treasurer with the usual powers of such officers, and such additional power and authority as said board may confer on such officers, and they shall be elected annually and hold their respective offices until their successors are elected and qualified.

IN WITNESS WHEREOF, we have hereunto set our hands this 21st day of July, 1908. [321]

United States of America,
Territory of Alaska,—ss.

BE IT REMEMBERED, that on this 21st day of July, 1908, before me, the undersigned notary public in and for the Territory of Alaska, personally appeared H. E. Ellis, George C. Treat and Edmund Smith, known to me to be the persons described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that they signed and sealed the same of their own free act and deed for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

B. B. LOCKHART,
Notary Public. [322]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 721.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Plaintiffs,

vs.

H. E. ELLIS,

Defendant.

**Order Allowing, Certifying and Settling Bill of
Exceptions.**

The matter of settling the record preparatory to appeal on the part of the defendant herein coming on for hearing on this 25th day of February, A. D. 1916;

And upon request of counsel for all parties hereto, and for good cause shown, the court hereby directing that the testimony of the witnesses Edmund Smith, Geo. C. Treat, Chas. Kraemer, Logan Archibald, B. F. Millard, H. E. Ellis, H. L. Rider, John Hughes and Chas. G. Ganty, given at the trial of said cause, shall be reproduced in the exact words of said witnesses;

And it appearing to the Court that counsel for the defendant and plaintiffs respectively, have stipulated and agreed upon a proposed bill of exceptions to be used upon appeal in this cause, and said proposed bill of exceptions having been delivered to the clerk of this court;

And said proposed bill of exceptions containing

what purports to be a transcript of the testimony and evidence upon which said cause was tried and final decree rendered herein, and the Court upon examination finding that the foregoing transcript of testimony in said proposed bill of exceptions contained, constitutes a full, true and correct copy and transcript of the testimony and evidence, and all of the same, upon which said cause was tried and final judgment and decree rendered herein; and it further appearing to the Court that said proposed bill of exceptions conforms to the truth [323] and is in proper form—

It is ordered that said bill of exceptions be and the same is hereby approved, allowed and settled and ordered to be filed and made part of the record in this cause.

Done in open court this 25th day of February,
A. D. 1916.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, Feb. 25, 1916. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 9, page 493. [324]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby

certify that the hereto annexed 325 pages, numbered from 1 to 325, inclusive, are a true and correct transcript of the records and files of the proceedings in the above-entitled cause, as the same appears on the records and files in my office; that the same is made in accordance with the stipulation of counsel for the parties, respectively.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and the cost thereof, amounting to \$47 25/100, was paid to me by Chas. G. Ganty, attorney for the defendant and plaintiff in error herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 25th day of February, A. D., 1916.

[Seal]

ARTHUR LANG,

Clerk of the District Court, Territory of Alaska,
Third Division.

By K. L. Monahan,

Deputy Clerk. [325]

[Endorsed]: No. 2758. United States Circuit Court of Appeals for the Ninth Circuit. H. E. Ellis, Appellant, vs. Geo. C. Treat, Edmund Smith and Logan Archibald, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.

Filed March 10, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2758

United States Circuit Court of Appeals

For the Ninth Circuit

H. E. ELLIS,

Appellant,

VS.

GEO. C. TREAT, EDMUND SMITH and LOGAN
ARCHIBALD,

Appellees.

OPENING BRIEF FOR APPELLANT.

T. C. WEST,

CHAS. G. GANTY,

Attorneys for Appellant.

Filed

MAY 29 1916

F. D. Monckton,

Clerk.

Filed this.....day of May, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2758

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. E. ELLIS,

Appellant,

VS.

GEO. C. TREAT, EDMUND SMITH and LOGAN

ARCHIBALD,

Appellees.

OPENING BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an action brought by the appellees as plaintiff in the Court below against the appellant, the defendant, to compel specific performance of a contract entered into between the parties hereto for the conveyance by the appellant to the appellees, Treat and Smith, of an undivided one-tenth interest each in and to eight mining claims situated in the Valdez Mining District in Alaska, and for a decree adjudging the appellees to be the owners of an undivided one-fifth interest in all machinery, tools, equipment, buildings and improvements thereon, in the

proportion of a one-tenth interest to the appellee, Treat, and one-twentieth interest each to the appellees, Smith and Archibald.

The contract attempted to be enforced is dated July 9, 1908, and is to be found in paragraph five of the complaint (Transcript of Record p. 5). This is a contract whereby the appellees, Treat and Smith, undertook and agreed to incorporate a company to be known as the Mystic Gold Mining Company, pay all the cost of incorporation, and "give their time and attention in selling the amount of treasury stock necessary to be sold and give whatever time and attention that may be necessary for the proper organization of said corporation *and the sale of said stock*" and any consideration of such conveyance appellant was to convey to said corporation, the said mining claims, receive all the stock and give to appellees, Treat and Smith, twenty (20) per cent thereof.

It was also provided in the contract and in consideration thereof, that the appellees, Treat and Smith, were to receipt in full to the appellant for all claims which they, or either of them, had against the appellant, amounting in all to seven hundred and sixty-one (\$761.00) dollars. The appellant disputes the amount of indebtedness and alleges that the appellees advanced to him the sum of five hundred (\$500.00) dollars prior to the making of the contract for the purpose of shipping a certain quantity of the ore mined from said claims to the smel-

ter, and the said five hundred dollars was to be repaid out of the proceeds of the shipment, and in case that was not sufficient, that the agreement relating to the \$500 should be deemed to be a mortgage against the said property to that extent. There was also a mortgage for two hundred (\$200.00) dollars and interest from appellant to the appellee Treat upon the said property. The appellees claim to have released above indebtedness, and the appellant denies the execution of any release. The agreement for the five hundred dollars is set forth as Exhibit "A" to the complaint (Transcript of Record p. 15). There are other exhibits to the complaint with relation to options and leases which will be treated in this brief under the argument.

The trial was held at Valdez before Honorable Fred M. Brown, judge of the Third Division of the District Court for the Territory of Alaska, and resulted in a verdict for the appellees. From the decisions of the said judge upon the demurrer to the complaint, motions to strike out portions thereof, and from the decree and judgment entered upon the trial, this appeal is taken, and the appellant relies on the following:

ASSIGNMENT OF ERRORS.

Now comes the defendant in the above entitled cause and files the following assignment of errors upon which he will rely upon his prosecution of the

appeal in the above entitled cause, from the decree made by this Honorable Court on the 16th day of October, 1915.

I.

That the above named District Court erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause.

II.

That the above named District Court erred in denying the motion of the defendant and appellant to strike out parts of plaintiffs' complaint filed in said cause.

III.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made in open court at the close of plaintiffs' case, over the objection and exception of defendant, in the manner following: By striking out from Paragraph VI of said complaint the words "hold said contract of July 9, 1908, in abeyance and" for the reason that such amendment was prejudicial to defendant in the trial of this cause and the variance between the proof offered by plaintiffs and said complaint is so great as to be fatal to the cause of said plaintiffs.

IV.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made in open court at the close of plaintiffs' case, over the objection and exception of defendant, in the manner following: By striking out from Paragraph VI of said complaint the words "At which time defendant specifically agreed verbally to and with plaintiffs Treat and Smith at the termination of said lease he would join Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and would carry out all the terms of said contract to be performed by him thereunder, or, that he, defendant, would deed to each of plaintiffs Treat and Smith an undivided one-tenth interest in and to each and all of said mining claims," for the reasons before stated.

V.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from Paragraph XIII of said complaint the words "the plaintiffs herein have been ready, able and willing to perform all of the matters and things to be performed by them, pursuant to the contract of July 9, 1908, heretofore set out, but" for the reasons above stated.

VI.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from Paragraph XIII of said complaint the words "to join plaintiffs in the organization of said corporation, or" for the reasons above stated.

VII.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint in said cause, made as aforesaid, and over the objection and exception of defendant, in the manner following: By striking out from said complaint, from the first paragraph of the prayer thereof, the following words: "Specifically perform the contract of July 9, 1908, set out in the fifth paragraph of this complaint, or that he" for the reasons above stated.

VIII.

That the above named District Court erred in denying the motion of defendant and appellant for a dismissal of this action by reason of the failure of plaintiffs to offer sufficient evidence to sustain their pleadings; which said motion, ruling of said Court and exception of defendant and appellant thereto, appear upon the record in said cause.

IX.

That the above named District Court erred in overruling defendant's objection and exception to the findings of fact and conclusions of law of the Court herein, for the reason that the same are against the law and contrary to the law and against the evidence and not supported by the evidence, and not justified by the evidence, and for the reason that there is not any evidence to support the same or any part of the same.

X.

That the above named District Court erred in rendering and making its final decree and judgment herein for the reason that the same was against the law and contrary to the law, and unsupported by the facts of the evidence, not justified by the evidence, and for the reason that there is no evidence to support the same.

ARGUMENT.

The writer will endeavor, in this brief, to discuss the errors complained of in the order in which they appear in the assignment of errors.

I.

The Court erred in overruling the demurrer interposed by the defendant and appellant to the original complaint filed in the cause. Appellant contends

that the complaint does not state facts sufficient to constitute a cause of action against him for the following reasons:

The action purports to be one to compel specific performance of the contract set forth in Paragraph V of the complaint, and nowhere does it appear that the plaintiffs had performed their part of the contract, to-wit: that portion of it in which the plaintiffs covenanted to "give whatever time and attention that may be necessary to the proper organization of said corporation AND THE SALE OF SAID STOCK." Nowhere does it appear that the plaintiffs ever gave the necessary, or any attention, to the sale of the stock, or ever sold a dollar's worth of stock. Of course, it is unnecessary to cite authorities to the point that specific performance will not be decreed unless the party asking it has performed or offered to perform these things that it was his duty to perform.

Further, the contract of July 9, 1908, calls for the release of *all* claims against the defendant, but the complaint only alleges the release of two specific claims.

Again, the contract is one that cannot be enforced by the Court by reason of a lack of mutuality of remedy. The Court may decree for specific performance by defendant, but could not decree that plaintiffs sell the amount of stock necessary to be sold and give their time and attention that might be necessary to the proper organization of said corpor-

ation, and especially the sale of such stock; that the contract sued on calls for the performance of personal services of an indefinite and uncertain character. It could not be specifically enforced against plaintiffs, and it is a fundamental principle of equity that equity will not enforce specifically a contract against one party when the Court could not in the very nature of things specifically enforce it against the other.

Federal Oil Company vs. Western Oil Co.,
121 Fed. 677;

Cooper vs. Pena, 21 Cal. 410;

Stanton vs. Singleton, 47 L. R. A. 334;

Harlow vs. Oregonian Pub., 78 Pacific 730;

Joliffe vs. Steele, 98 Pacific 544.

The appellant further contends that the contract in question is indefinite and uncertain and could not for that reason be specifically enforced by the appellees against him in that it does not show how much money should be raised by the plaintiffs by the sale of stock, nor when the same should be sold, nor how much time the plaintiffs should give to the organization of the corporation, and especially to the selling of the stock.

Stanton vs. Singleton, 47 L. R. A. 344.

Another interesting case on the question of mutuality of remedy is

General Electric Co. vs. Westinghouse, 144
Fed. 458.

The allegations that defendant and plaintiffs, Treat and Smith, agreed mutually to hold the contract of July 9, 1908, in abeyance and entered into a contract with A. J. Crane to lease the mining claims do not alter the terms of the contract itself, and it is apparent from the pleadings that the plaintiffs Treat and Smith lost nothing by such a holding in abeyance, since they plead the stringency of money market and the difficulty that would be experienced in selling the treasury stock agreed by them to be sold.

The allegations in the complaint that the plaintiffs and defendant agreed verbally that at the termination of the release referred to in the complaint that the defendant would join the plaintiffs, Treat and Smith, in forming the corporation as provided for in the contract of July 9, 1908, and that he would deed to each of them an undivided one-tenth interest in the claims, is clearly within the statute of frauds, and therefore ought to have been in writing for two reasons :

First, by its terms, it was not to be performed within a year from the making thereof, and,

Secondly, that it was a verbal agreement for the sale of real property or an interest therein, because it cannot be seriously contended that this was not a new contract and being verbal, it was clearly void, and, furthermore, there was no consideration whatever for it.

The statute of frauds, as laid down in the Alaska Code, is not different from other statutes of fraud in the other states (see Section 1044 Carter's Annotated Alaskan Codes, page 354; also Section 1046, page 355).

It is believed for these reasons that the complaint in this action does not state a cause of action against the defendant and therefore that the Court erred in overruling the demurrer.

II.

That the above named District Court erred in denying the motion of the defendant and appellant to strike parts of plaintiffs' complaint filed in the said cause.

The motion to strike out portions of the complaint is found on page 28 of the Transcript of Record, and in connection therewith, counsel will endeavor to make his argument as short and concise as facts will permit him.

In connection with this motion to strike, it must be remembered that the action is one to compel specific performance of the contract of July 9, 1908, referred to in Paragraph V of the complaint. This being the case, can there be any argument on the question that Paragraph II (Transcript of Record p. 3), setting forth that before the said contract was entered into that the plaintiffs, Treat and Smith, advanced the defendant the sum of \$500; and in

connection therewith, the plaintiffs have attached to their complaint Exhibit No. 1, Transcript of Record p. 15, is not irrelevant and redundant? The agreement which is sought to be enforced provides that the plaintiffs should release to the defendant all previous indebtedness by him to them; therefore, why should the details of this previous indebtedness be inserted in the complaint if it was not for the purpose of bolstering up the theory that is dear to the heart of every Alaskan miner, that the plaintiffs had grub-staked the defendant in his mining operations, and that the subtlety of this intention permeated the case, was finally shown by the decision of the learned trial judge? But so far as the prosecution of this action was concerned, it was no more material to set out the facts alleged in Paragraph II and Exhibit "A" connected therewith than it would be to allege any other indebtedness. The contract itself speaks of previous indebtedness to the defendant and alleges that such debt was to have been cancelled and, at the most, Paragraphs II and III of the complaint were evidentiary and are certainly redundant and surplusage.

The third cause for the motion to strike as to Paragraph IV of the complaint, the writer submits is covered by the objections above urged as to Paragraph III of the complaint. Paragraph IV of the motion to strike out portions of Paragraph V of the complaint is based upon the ground that the contract mentioned in said Paragraph V is such a one that the Court could not order specific performance

of, for the reasons that it is uncertain and incapable of being enforced against both parties thereto, and is therefore irrelevant and redundant.

Paragraph VI of the complaint is objectionable on the ground that therein is contained an effort to vary by parol agreement the terms of a written document, to-wit: the contract of July 9, 1908. Paragraph VII of the complaint, counsel submits, is irrelevant and immaterial by reason of the fact that therein it is attempted to set up a new written agreement which is not the one that is sought to be enforced in this action; and for the additional reason that there is no consideration alleged therein moving from the plaintiffs to the defendant.

Paragraph X of the complaint is clearly immaterial and redundant by reason of the fact that if the plaintiffs could recover, under the contract in question, a twenty per cent interest in said real estate, it would naturally follow that the buildings upon the premises would go with it, and the latter part of Paragraph X wherein it is alleged that the plaintiffs are the owners of twenty per cent interest in said mining claims, and under the terms of the lease mentioned, are the owners of twenty per cent interest in and to the tools, machinery, buildings and equipment is surplusage, and is immaterial and is a mere conclusion of the pleader without any facts having been theretofore stated to show that the plaintiffs were such owners.

The objection to Paragraph XII of the complaint to the effect that the defendant, during all of the time mentioned since the execution of the contract of July 9, 1908, never questioned or disputed the right and title of plaintiff to said premises and property, but during all of said time recognized and provided said title by plaintiffs is purely evidentiary and should have no part in the complaint in this action.

Counsel for the appellant therefore submits that the motion to strike out the portions of the complaint complained of was so clearly right that it would be idle to cite authorities upon facts so clearly demonstrated.

III.

That the above named District Court erred in allowing plaintiffs' motion to amend their complaint at the close of plaintiffs' case by striking out from Paragraph VI the words "holds said contract of July 9, 1908, in abeyance and," and also for permitting the plaintiffs to amend their complaint by striking out from Paragraph VI of the complaint the following sentence: "At which time defendant specifically agreed verbally to and with Treat and Smith at the termination of said lease, he would join Treat and Smith in forming the corporation as provided in said contract of July 9, 1908, and would carry out all of the terms of said contract to be performed by him thereunder, or that he, defendant,

would deed to each of plaintiffs Treat and Smith an undivided one-tenth interest in and to each of the said mining claims.”

If it was proper, or even admissible, for the Trial Court to strike from the complaint the above extracts after trial, surely it is a demonstration of the fact that the Court ought to have sustained the demurrer to the complaint in its original form and should also have granted the motion to strike, interposed by the defendant. Could there be any reason for striking out the expression “to hold said contract of July 9, 1908, in abeyance” unless the Court had in mind, and unless the evidence showed, that there was no consideration that was enforceable, by reason of lack of consideration? And counsel for the appellant is at a loss to know why the Court struck out the latter portion of the paragraph referred to if it was not in an effort to avoid the statute of frauds. The complaint was verified and stated specifically in Paragraph VI that the agreement of the defendant to deed to the plaintiffs Treat and Smith an undivided one-tenth interest in the said mining claims was verbal.

Surely the plaintiffs were bound by their verified complaint, and if it was true that the agreement was verbal, then it came within the statute of frauds and was void. This, one of the plaintiffs in the action swore to, and counsel for the appellant refers the Court to the previous argument with relation to the statute of frauds in the discussion upon the demurrer to the complaint.

The fifth assignment of error is based upon the action of the District Court for permitting the plaintiffs' motion to amend their complaint by striking out from Paragraph XIII the words, "plaintiffs herein have been ready, able and willing to perform all of the matters and things to be performed by them, pursuant to the contract of July 9, 1908," heretofore set out. If it is true, and the appellant claims it is, that the appellees did not show in the trial of the cause that they were ready, able and willing to perform their part of the contract of July 9, 1908, then it was error to strike out that allegation in Paragraph XIII because without that allegation, followed by proof of the willingness and the ability of the plaintiffs to perform their parts, the action for specific performance would naturally fail. This suggestion runs as well to Assignment of Error VI and VII, Transcript of Record pp. 352-353. It would seem to counsel for the appellant that the Court went to trial upon a defective complaint, but which, nevertheless, contained specific statements which were essential to the plaintiffs' case, and when the proof utterly failed to establish these allegations, the Court thereupon permitted the complaint to be filed to fit the proof and completely changed the cause of action.

Again, counsel refers to the fact that this action is brought, and the prayer of the original complaint was, that the defendant specifically perform the

contract of July 9, 1908; then, the Court, after proof, strikes out all reference to the contract of July 9, 1908, and gives a judgment against the defendant upon other and subsequent contracts, some of them written and some of them verbal, and to none of which there was any consideration and decrees that the plaintiffs are entitled to a one-fifth interest in this valuable mining property.

The eighth assignment of error, Transcript of Record p. 353, which suggests that the Trial Court erred in denying the motion of defendant for dismissal of the action by reason of the failure of plaintiffs to offer sufficient evidence to sustain their pleadings, hardly needs an argument because of the fact that if the Court had not permitted the plaintiffs to entirely change their cause of action after the plaintiffs' case was complete, there would have been no evidence whatever to warrant such a verdict as the one that was rendered; in other words, the plaintiffs predicated their suit on a certain contract and wound up by getting a judgment on a totally different contract, partly written and partly verbal.

There is a great mass of evidence in the case showing a violent difference between the stories of the plaintiffs and defendant, but, had the plaintiffs been restricted in the giving of their evidence to the four corners of their complaint the action would inevitably have been dismissed.

It is respectfully submitted, therefore, that the judgment of the Court below should be reversed.

Respectfully submitted,

T. C. WEST,
CHAS. G. GANTY,
Attorneys for Appellant.

No. 2758

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

H. E. ELLIS,

Appellant,

vs.

GEO. C. TREAT, EDMUND SMITH
and LOGAN ARCHIBALD,

Appellees.

Appellees' Brief

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE TERRITORY
OF ALASKA, THIRD DIVISION.

DONOHUE & DIMOND,
LYONS & RITCHIE,

Valdez, Alaska,

SMITH, NEWCOMB &
WORTHINGTON,

Attorneys for Appellees. 1918

1212 American Bank Bldg.,
Seattle, Washington.

No. 2758

IN THE
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Attorneys for Appellees.

1212 American Bank Bldg.,
Seattle, Washington.

prior to the date of hearing this action. The appellees in order to avoid a continuance or delay are compelled to prepare their brief without being advised as to the contention of the appellant, further than what may be gathered from his assignments of error.)

STATEMENT OF THE CASE.

This is an appeal from the United States District Court for the Territory of Alaska, Third Division. The proceeding which this court is called upon to review was an equitable action brought by the appellees against the appellant. In the court below, appellees were decreed to be the owners and entitled to the immediate possession of an undivided one-fifth interest in and to eight certain lode mining claims, situated on Valdez Bay. The decree further required appellant to convey to the appellees said undivided one-fifth interest according to the respective interests of the appellees, and further enjoined appellant from in any manner contesting the rights of said appellees to their interests in said property, and commanded appellant to let said appellees into immediate possession and enjoyment of their interest therein.

On and prior to May 15th, 1907, the appellant H. E. Ellis was the owner of the Mystic lode mining claim, situated on Valdez Bay. On said 15th day of May, 1907, appellant entered into an agreement with appellees Treat and Smith, whereby said appellees advanced the sum of \$500.00 to appellant to enable appellant to mine and ship about five tons of ore to a smelter outside of the Territory of Alaska. Under the terms of said agreement, said appellees Treat and Smith were to receive back said sum of \$500.00, together with twelve per cent interest thereon and one-fourth of the net returns from the smelter. This contract was made in the form of a mortgage and provided on its face that it was a mortgage provided appellant failed to carry out said contract. Something over four tons of ore were shipped subsequent to this contract and the returns from the smelter were so unsatisfactory to all parties concerned that no further shipments were made. The matter remained in this condition until July 9, 1908, when a second contract, in writing, was made between said parties, whereby it was agreed that a mining corporation was to be formed by the parties to said agreement. Under the terms of this agreement, appellant was to deed eight gold mining claims, including said Mystic gold mining

claim, to said corporation, in return for which all of the capital stock of said corporation was to be issued to appellant Ellis, as owner, who was to transfer to appellees Smith and Treat twenty per cent of said capital stock, and turn over to the treasury of the corporation twenty per cent, to be sold to pay for development on said claims. In consideration therefore the appellees Treat and Smith agreed to "pay all expenses in incorporating said company, recording and filing the necessary papers thereof, and receipt in full for all claims that said Treat and Smith, or either of them, have against said Ellis," and "to give whatever time and attention that may be necessary to properly organize said corporation and the sale of said stock." Appellee Smith, who is an attorney at law, prepared the articles of incorporation in quadruplicate and certain written agreements, signed by appellant, wherein he agreed to deed to the corporation twenty per cent of the capital stock. Due to financial conditions in Valdez at that time none of the treasury stock of the corporation was sold, and the corporation papers were never filed or recorded for the reason that the parties did not wish to tie the property up in a corporation until some assurance could be had that the treasury stock could be placed. In May, 1909, one A. J.

Crane, of Seattle, Washington, went to Valdez, Alaska, with a stamp mill to be placed on some property that he and others had become interested in. This property proved to be valueless and the appellees Treat and Smith endeavored to induce Mr. Crane to buy the treasury stock in said corporation. Said Crane examined the property and made a proposition to lease it for a term of years. Appellant was willing to join in the making of a lease, but insisted upon greater royalties than said Crane was willing to give. In order to induce appellant to join in the making of a lease, appellees Treat and Smith, who were anxious to have the property developed, agreed to accept fifteen per cent of the royalty during the life of the lease, insisting, however, upon retaining their full twenty per cent interest in said property.

Accordingly, on June 5, 1909, appellant and appellees Treat and Smith, as owners, gave to said Crane an option to lease said mining claims. Under the terms of said option twenty per cent of the net product of said mining claims during the first year and for the remaining five years twenty-five per cent of the net proceeds, was to be paid to the lessors, Ellis, Treat and Smith. Eighty-five per cent of said royalty was to be paid to the appellant and fifteen per cent to the appellees Treat

and Smith. The lessee was to erect suitable reduction works on said mining claims, and all machinery and improvements were to revert to the owners of said mining claims at the expiration of said lease.

On the 23rd of July, 1909, one B. F. Millard, Trustee, who had purchased all of the rights of said Crane under said option, entered into a lease with the appellant and the appellees, Treat and Smith. The caption of said lease was as follows:

“This indenture made this 23rd day of July, A. D. 1909, between H. E. Ellis, four-fifths owner, George C. Treat and Edmund Smith, each owning ten per cent, all of Valdez, Alaska, parties of the first part, and lessors, and B. F. Millard, Trustee, of Valdez, Alaska, party of the second part, and lessee, Witnesseth:”

This lease further provided for the return of the property to the lessors at the expiration of the lease. The said lessee Millard formed a company called the Cliff Gold Mining Company and proceeded to develop the property. This venture met with success.

While the mining operations were being carried on there were numerous objections and exceptions by the owners of the property signed by the appellant Ellis and the appellees Treat and Smith, objecting to the method of mining, and throughout

the period of such operation all expenses which were found to be proper charges against the owners of the property were distributed on a basis of eighty per cent to appellant Ellis and twenty per cent to the appellees.

On or about the 3rd day of January, 1913, the appellee Logan Archibald, purchased from appellee Edmund Smith, an undivided one-half of said Smith's interest in and to each and all of said mining claims. Upon the trial of the case below the court found for appellees. From the entry of the decree in favor of the appellees this appeal has been prosecuted.

ARGUMENT AND AUTHORITIES.

Appellant's first assignment of error is directed to the ruling of the trial court upon appellant's demurrer to the appellees' complaint. The first ground of the demurrer, namely, that several causes of action have been improperly united, is clearly bad, as will appear by a very casual examination of the complaint.

The second ground of demurrer, namely, that the complaint does not state facts sufficient, is also bad, as will appear from reading the com-

plaint. The complaint clearly states a cause of action. However, after the appellant's demurrer was overruled, the appellant proceeded to trial and made no objection and took no exception to the introduction of evidence under the complaint, so that any error that might have been committed by the court in sustaining the demurrer (as to the second ground of the demurrer), was clearly waived by not objecting to the introduction of any evidence at the commencement of the trial, and the evidence having been admitted, under the Alaska Code of Civil Procedure, the complaint must be treated as amended to conform to the proofs. Compiled Laws of the Territory of Alaska, Sections 919 to 924, inclusive.

Appellant's second assignment of error is directed to the ruling of the court in denying appellant's motion to strike from the appellees' complaint. The ruling of the court in this respect was clearly right. First, because the motion to strike is not directed to any particular allegation contained in the complaint, but refers merely to *paragraphs* or parts of *paragraphs*. It is elementary that there is no such a thing known to our system of pleading, either at common law or by code, as a *paragraph*. Merely as a matter of convenience custom has grown up to separate the va-

rious allegations contained in a pleading into paragraphs, but the paragraph is no part of a pleading and a motion can only be directed to some specific allegation or allegations contained in the pleading, and the paragraph is referred to merely as a matter of convenience in locating the particular allegation referred to.

Furthermore, the only ground contained in the motion to strike, is "*That the same is immaterial, irrelevant, redundant and surplusage,*" so it is apparent that the ruling of the court could not be prejudicial even though it might have been technically erroneous and especially is this true in a case that is tried to the court, for it is presumed that the court being learned in the rules of pleading and evidence, will disregard any *immaterial, irrelevant, or redundant* matters.

Appellant's assignments of error Nos. 3, 4, 5, 6 and 7 are all predicated upon the ruling of the court in permitting the appellees to amend their complaint at the close of their evidence, by striking therefrom certain allegations. It is not claimed by the appellant that he has been misled to his prejudice by the amendment sought and it was clearly not an abuse of discretion by the trial court in granting the motion.

Amendments may be allowed in the discretion of the trial court at any time. *Ebner Gold Mining Co. vs. Alaska Juneau Gold Mining Co.*, 210 Fed. 599. *Compiled Laws of the Territory of Alaska*, Section 919 (*Carter's Alaska Code*, Part 4, Section 87):

“No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.”

Compiled Laws of Alaska, Section 920 (*Carter's Alaska Code*, Part 4, Section 88):

“When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.”

Compiled Laws of Alaska, Section 924 (*Carter's Alaska Code*, Part 4, Sec. 89):

“The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party, or other allegation material to the cause, and in like manner and for like reasons it may, at any time before the cause is submitted, allow such plead-

ing or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming to the pleading or proceeding to the facts proved."

Appellant's eighth assignment of error is predicated upon the ruling of the court denying his motion for non-suit at the close of appellees' case. The record discloses that after his motion for non-suit was denied, appellant proceeded to introduce evidence on his own behalf instead of resting upon his motion, and under these conditions any error that the court might have committed in ruling upon the motion has been waived. "If the motion be treated as proper in form, it was waived by the defendant's proceeding to introduce evidence on its own behalf, instead of resting upon the motion, and the action of the court in respect to the motion, cannot, therefore, be assigned for error here."

Northwestern Steamship Co. vs. Griggs, 146 Federal, 472.

"The rule is well settled that a motion for a nonsuit, upon which the party making it does not choose to stand, is waived by the subsequent introduction of evidence on his own behalf."

Levy vs. Larson, 167 Federal, 110.

Appellant's assignments of error nine and ten raise the question of the sufficiency of the evidence only. It is not claimed that the conclusions of law made by the court were erroneous, if the court's Findings of Fact be accepted as correct.

It will not be contended even by appellant that the appellees introduced no evidence that would tend to support the findings of the lower court. There being some evidence to support the findings of the trial court, those findings will not be disturbed on appeal.

"The case having been tried without the intervention of a jury, the court's findings are conclusive of the question of fact, unless it be that there is no evidence to support them. The rule is that the findings of fact of the court, whether special or general, will not be disturbed if there is any evidence upon which such findings could be made." (Citing authorities.)

Cook vs. Robinson, 194 Fed. 753, at page 759.

"When the chancellor has considered conflicting evidence, and made his findings and decree thereon, they must be taken to be presumptively right; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they must be permitted to stand." (Citing authorities.)

De Laval Separator Co. vs. Iowa Dairy Separator Co., 194 Fed. 425.

The authorities to this point are so numerous that we could go on quoting and citing almost indefinitely, but we consider that the question is so well settled that it will not be necessary for us to cite additional authorities.

The Findings of Fact made by the trial court are as binding and conclusive upon this court as the verdict of a jury would be, had the issues of fact been tried to a jury. The Alaska code, with reference to actions of "an equitable nature" among other things provided: "In all such actions the court, in rendering its decisions therein, shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment, and shall be filed with the clerk, and shall be incorporated in, and constitute a part of, the judgment roll of the case; and such findings of fact shall have the same force and effect, and be equally conclusive, as the verdict of a jury in an action. Exceptions may be taken during the trial to the ruling of the court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action, and the same shall be filed with the clerk within ten days from the entering of the decree, or

such further time as the court may allow.” (Sec. 1204, *Compiled Laws of the Territory of Alaska*, 1913; *Carter’s Code*, 372.)

The court made its findings of fact and conclusions of law as required by the statute, but the appellant took no exceptions to the findings made by the court, and has not prepared a bill of exceptions of any kind (at least, there is none contained in the printed record furnished to appellees.)

There having been no exceptions taken to the court’s findings of fact and the lower court not having been offered an opportunity by motion for a new trial, or otherwise, to consider the errors, if any, in its findings of fact and conclusions of law, by having the same called to its attention by proper exceptions, this court will not review the evidence or the findings of the trial court and will simply consider the one question as to whether or not the decree of the court is supported by its findings and conclusions.

“The absence of a proper bill of exceptions leaves the case open for consideration upon the pleadings, findings of fact, conclusions of law, and decree, under which the substantial merits of the case will be determined.”

Dalton vs. Hazelet, 182 Fed. 561.

Vera Cruz & P. R. Co. vs. Waddell, et al., 155
Fed. 401.

The rule, we believe, is without exception that the appellate court will not review the evidence or disturb the findings of fact of the trial court in the absence of proper exceptions to the findings, and the evidence contained in the transcript of the record should be stricken out by the court and the judgment affirmed; for the appellant does not contend that the decree of the lower court is not supported by the findings as made by the court.

In any event, the findings of fact made by the court below are amply and fully sustained by the overwhelming weight of the evidence.

As at the trial in the lower court, appellant will no doubt urge that the letter written by appellees Treat and Smith to him on June 5th, 1909, is conclusive of this case (defendant's Exhibit No. 9, Transcript 237).

This letter was written during negotiations between these parties and was a proposition made by appellees to appellant to "accept fifteen per cent net of royalty on lease of property provided the contract of lease is satisfactory or we will accept \$12,500 in cash net for our interest in said property." In the absence of any other evidence, such

a construction as appellant now places upon this letter might be possible, though we submit that even then such a construction would be strained.

The most that can be said is that the language of this letter is somewhat ambiguous and in the light of the other evidence in this case, no such construction can be placed upon the letter.

To begin with, it is unreasonable to suppose that men such as appellees Treat and Smith, familiar with the uncertainties of mining ventures, would be willing to waive substantial rights in consideration of a mere gambler's chance that any royalties would ever be paid under the lease. Moreover, the lease which was executed after the delivery of the letter, describes appellees Treat and Smith, as the owners of an undivided one-tenth interest each in said mining claims (plaintiff's Exhibit C, Transcript 20).

Appellant seeks to overcome the weight of the evidence against him due to his signature to this lease, by posing as a man little versed in business methods, and by explaining that it was represented to him by appellee Smith that the interests of all parties concerned could best be served by describing appellees Treat and Smith as part owners. This explanation is not plausible, and a casual examination of the evidence in this case clearly demon-

strates that appellant is not as unsophisticated as he claimed at the trial to be, especially in view of the fact that he took the letter above referred to to attorneys for a construction to the effect that the appellees were limited merely to an interest in the royalties. Moreover, he himself testifies (Transcript, page 290) that had the lease failed to produce any royalties he intended to pay back to appellees their money, with interest.

During the life of the lease numerous protests were directed to the Cliff Gold Mining Co. concerning their methods of mining the ore, making certain charges against the owners of the property and against a contemplated sale of machinery which had been placed upon the property by the lessee. These protests were signed by appellant and appellees Treat and Smith as owners of the property. All statements made to appellant and appellees by the Cliff Gold Mining Co. described them as owners of the property, and the expenses of a permanent survey for patent purposes were charged to the expense of appellant and appellees according to their respective interests in the *property*, and not according to their interests in the *royalties*. (Plaintiff's Exhibit E, Transcript, page 123; Plaintiff's Exhibit F, Transcript, page 125; Plaintiff's Exhibit G, Transcript, page 132; Plaintiff's Exhibit K,

Transcript, page 192; Defendants' Exhibit 8, Transcript, page 151).

The court's attention is respectfully directed to the fact that the protest against the sale of the machinery was made by appellees Treat and Smith. Had they been interested only in the royalties as now contended by the appellee, it would have been strongly to their interest to have had this machinery sold, in which event they would have received their pro rata portion of the proceeds of the sale. The evidence shows and the witness Millard and others testified that appellant directed the Cliff Company to charge against appellees Treat and Smith their proportionate amount of all accounts chargeable to the owners of the property (Transcript, page 204).

The only protest ever directed to the Cliff Mining Co. on behalf of appellant against the recognition by said company of appellees as part owners of said property, was a letter of July 22, 1914, written by W. M. Ellis, brother and agent of appellant, at the direction of Mr. Ganty, attorney for appellant. (Defendants' Exhibit 11, Transcript, page 317.)

According to Mr. Ganty's testimony, this letter was not written at the request of appellant. That

appellant at that time recognized appellees as part owners of said mining properties, is clearly shown by the letter of appellee Treat to appellant, dated Dec. 4, 1914, and the answer to this letter by appellant. (Plaintiff's Exhibit J, Transcript, page 180; Plaintiff's Exhibit J, Transcript, page 182.)

The language of appellee Treat's letter was not written by a man who, as appellant contends, had lost all interest in these mining properties by the cancellation of the Millard lease in July, 1914. In fact, it clearly shows that appellee Treat then did and always had considered himself part owner of said property. Had appellant on the other hand, as he now claims, never known that appellee Treat claimed to be a part owner of said property until shortly before the commencement of this action in the court below, he would, as the trial court so clearly points out, have made some objection in his letter to appellee Treat's clear intimation that he was vitally interested in the further leasing and working of the property.

We deem that any further discussion of the evidence in this case is unnecessary, particularly in view of the learned trial court's clear and convincing opinion rendered at the conclusion of the trial in this case. (Transcript, pages 62-73.)

We submit that appellant assignments of error are wholly without merit and that the decree of the learned trial court should be affirmed.

T. J. DONOHOE,
A. J. DIMOND,
JOHN LYONS,
E. E. RITCHIE,
EDMUND SMITH,
L. V. NEWCOMB,
A. G. WORTHINGTON,
Attorneys for Appellees.

No. 2758

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

H. E. ELLIS,

Appellant,

vs.

GEO. C. TREAT, EDMUND SMITH
and LOGAN ARCHIBALD,

Appellees.

Appellees' Petition for Rehearing

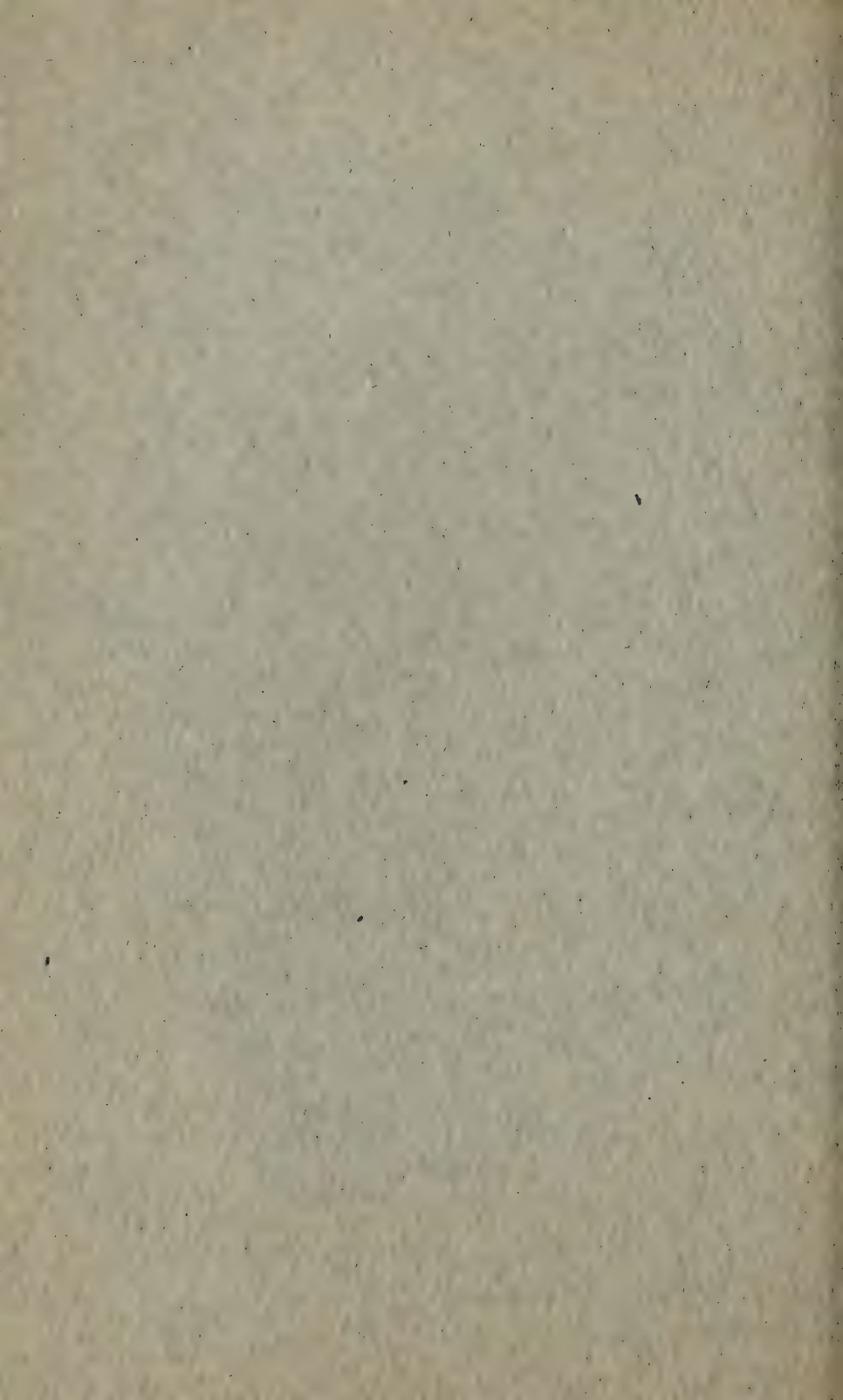
Filed

OCT 16 1916

SMITH, NEWCOMB & WORTHINGTON, *By* D. Monckton

Attorneys for Petitioners.

1212 American Bank Bldg.,
Seattle, Washington.



No. 2758

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H. E. ELLIS,

Appellant,

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and LOGAN ARCHIBALD,

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Appellees' Petition for Rehearing

SMITH, NEWCOMB & WORTHINGTON,
Attorneys for Petitioner.

1212 American Bank Bldg.,
Seattle, Washington.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

H. E. ELLIS,

Appellant,

vs.

GEO. C. TREAT, EDMUND SMITH
and LOGAN ARCHIBALD,

Appellees.

Appellees' Petition for Rehearing

TO THE HONORABLE, THE CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT:

Having carefully examined the opinion of the Honorable Court, we think that with propriety we may ask the Court to consider whether this case be not one in which it would be proper to grant a rehearing to appellees on the grounds:

I.

That appellees did not have their day in Court or opportunity to present their case as provided by law and by the rules of this Court.

II.

That the allegations of the complaint upon which the decision of this Honorable Court seems to have been based were stricken out by the Trial Court, and were no part of the record on appeal.

Discussing these questions in the above order, the brief of appellant was not served upon appellees until the day the case was called for hearing in this Court, although appellees were induced to stipulate for hearing of said cause on said date on advice by wire that appellant's brief had been sent. Correspondence between counsel for appellant and appellees follows:

March 9, 1916.

T. C. WEST,
Phelan Bldg.,
San Francisco, Calif.

Dear Mr. West:

Enclosed herewith please find notice of appearance in the case of George C. Treat, et al., vs. H. E. Ellis, appealed from the District Court of the Territory of Alaska, Third Division.

I am advised that you are attorney for Mr. Ellis in this appeal. Will you kindly admit service of the notice of appearance herein and return the same to me, and oblige.

I would also like to have the case transferred to Seattle for hearing if agreeable to you.

I am enclosing herewith stipulation to that effect. If you cannot sign the same, it is all right, but it would be a great accommodation to me.

With personal regards, I am,

Very truly yours,

ES/W.

EDMUND SMITH.

April 12, 1916.

T. C. WEST,

Phelan Bldg., San Francisco, Calif.

Dear Mr. West:

Have you prepared your abstract in the case of Treat and others against Ellis in the Court of Appeals? If so, will you kindly serve the same? Also serve your brief as soon as you can, so that we can prepare and serve our brief on or before May 25th, as I see the case is set for that date.

What do you hear about the case of Ballaine vs. Boland, et al.?

Very truly yours,

SMITH, NEWCOMB & WORTHINGTON.

ES/W.

By EDMUND SMITH.

April 21, 1916.

T. C. WEST,

Phelan Bldg.,

San Francisco, Calif.

Dear Mr. West:

I wrote you on April 12th in reference to the abstract and brief in the case of Treat and others

against H. E. Ellis. While it is probably a little early for an answer, but I note by the Docket in the Court of Appeals that the case is set for May 25th, and unless it is continued it would give us very short time to prepare and serve our answering brief.

Can you kindly advise me as to what time you can serve us with the abstract and your brief? I should not mention it at this time, but I will probably be called East soon, and my associates, of course, are not so familiar with the record as I am, and if we could secure the abstract and your brief before I leave without inconveniencing you, we would very much appreciate the same.

Very truly yours,

SMITH, NEWCOMB & WORTHINGTON.

ES/W.

By EDMUND SMITH.

May 10, 1916.

EDMUND SMITH,
Attorney, American Bank Building,
Seattle, Wash.

My brief Ellis Treat in printer's hands, will forward ample of days will you consent to argument going over till end of term, about June first? Will give longer time for you to reply and accommodation to me.

T. C. WEST.

May 11, 1916.

T. C. WEST,
Attorney at Law,
Phelan Bldg.,
San Francisco, Calif.

Extension time argument Ellis Treat to May thirty provided you serve brief by seventeenth.

We have twenty-ninth serve brief provided case submitted this term. Money tied up do not care to go over term. Rules time answer briefs too short this distance. Wire if conditions satisfactory.

EDMUND SMITH.

May 17, 1916.

EDMUND SMITH,
Atty., American Bank Bldg.,
Seattle, Wash.

Ellis case over to thirty-first, sending my brief send yours by thirtieth, all right.

T. C. WEST.

May 18, 1916.

T. C. WEST,
Phelan Bldg.,
San Francisco, Calif.

Wire received. Supposed to have your brief seventeenth. Will need few days prepare answering brief necessarily. If on the way all right.

EDMUND SMITH.

May 12, 1916.

EDMUND SMITH,
Attorney, American Bank Bldg.,
Seattle, Wash.

Telegram received. Time satisfactory will have argument put over to thirtieth or thirty-first so as to be submitted this term.

T. C. WEST.

May 23, 1916.

T. C. WEST,
Phelan Bldg.,
San Francisco, Calif.

Briefs Ellis case not received. Give date you mailed them.

EDMUND SMITH.

New York, June 8, 1916.

T. C. WEST, Esq.,
Phelan Bldg.,
San Francisco, Calif.

Dear Mr. West:

In my correspondence with the firm in Seattle they have not mentioned the receipt of your brief in the case of Ellis vs. Treat et al. Mr. Ritchie wired me from San Francisco that you had served a brief on him. I would like to have about three copies of the same if you can spare them. If you would have your clerk mail one copy to me at the Wolcott Hotel, 5th Ave. & 31st Street, New York City, and two copies to my office in Seattle I would very much appreciate the same. Also if you decide to serve reply briefs kindly mail same as above and by doing so you will greatly oblige, and I will try to reciprocate in any way that I can.

Very truly yours,

ES/MC

EDMUND SMITH.

Sept. 7, 1916.

T. C. WEST,
Phelan Bldg.,
San Francisco, Calif.

Dear Sir:

I have written several times for copies of your brief in the case of Treat vs. Ellis. Would you

please send me by return mail a copy of your original brief and also reply brief, if one was filed. We have never received a copy of either.

You will confer a favor upon me by mailing them to me by return mail.

Yours very truly,

ES/W.

EDMUND SMITH.

Sept. 11th, 1916.

EDMUND SMITH, Esq.,
Attorney,
Seattle, Wash.

Treat vs. Ellis.

My Dear Smith:

By concurrent mail I am sending you copies of my brief in this case. I mailed a couple of copies to you at the time it was filed but evidently they went astray in some manner.

I am also sending you a copy of the decision which will save you the trouble of sending for it.

Yours very truly,

T.C.W.

T. C. WEST.

The above is correct copy of the correspondence between counsel for appellant and counsel for appellees in reference to serving and filing briefs herein.

That by reason of the failure of counsel for appellant to serve the brief of appellant as provided by the rules of this Court, and the stipulation

of the parties above set out, appellees were compelled to prepare, serve and file their answering brief without knowledge of the contents of appellant's brief and without opportunity of answering the same. (See preliminary statement in appellees' brief.)

Referring to the second proposition, viz., that the allegations of the complaint upon which the decision of this Honorable Court seems to have been based, were stricken out by the trial Court, and were no part of the record on appeal. The opinion of this Honorable Court that the complaint does not state facts sufficient to constitute a cause of action, seems to be based on the provisions of the written contracts between plaintiffs Treat and Smith and the defendant of date May 15, 1907, Exhibit "A" of plaintiff's complaint, and the contract of July 9, 1908, set out in full as part of Paragraph V of plaintiff's complaint, and especially the contract of July 9, 1908, the theory of the Court seems to be that plaintiffs were seeking to specifically enforce said contract and especially the provisions therein in regard to the incorporation of the Mystic Gold Mining Company; but as shown by the abstract, pages 214, 215 and 216, all that part of the complaint was stricken, and that

our position herein may be clear to the Court, we are submitting herewith a copy of the complaint as amended, omitting the formal parts:

Come now the above named plaintiffs, and for cause of suit against the above named defendant, alleges as follows, to-wit:

I.

That on the 15th day of May, 1907, the defendant was the sole and legal owner of those certain eight (8) lode mining claims, situate on the northerly side of Valdez Bay, between Gold Creek and Shoups Bay, in the Valdez recording precinct, Territory of Alaska, named and described as follows:

The Mystic No. 1 lode claim, notice of location of which is of record in Book K of Mining Locations, at page 506, of the records of said Valdez recording precinct, at Valdez, Alaska.

The Mystic No. 2 lode claim, notice of location thereof being of record in said Book K, at page 505, of said records.

The Mystery No. 1 lode claim, notice of location thereof being of record in Book O of Mining Locations, at page 452, of said records.

The Mystery No. 2 lode claim, notice of loca-

tion thereof being recorded in said Book O, at page 453, of said records.

The Mystery No. 3 lode claim, notice of location thereof being recorded in said Book O, at page 605, of said records.

The Parallel No. 1 lode claim, notice of location thereof being of record in said Book O, at page 607, of said records.

The Parallel No. 2 lode claim, notice of location thereof being of record in said Book O, at page 606, of said records.

The High Bar lode claim, notice of location of which is of record in said Book O, at page 451, of said records.

That the legal title to each and all of said mining claims ever since the said 15th day of May, 1907, has been and now is in the name of said defendant.

II.

That on the said 15th day of May, 1907, said defendant and plaintiffs Treat and Smith entered into a contract in writing concerning "Mystic No. 1" lode claim above described, this being the most valuable of said mining claims; said "Mystic No. 1" lode claim is described in said contract as "Mystic Lode Mining Claim." That under the terms of

said written contract plaintiffs Treat and Smith advanced to defendant the sum of Five Hundred Dollars (\$500) for the purpose of enabling the defendant to mine and ship to the Tacoma smelter, at Tacoma, Washington, five tons of ore from said mining claim, for the purpose of a test of said ore, and said plaintiffs were to receive twenty-five per cent of the net returns of said shipment, together with re-payment to them of the said sum of Five Hundred Dollars so advanced, and, in case seventy-five per cent of the net returns of said shipment was not sufficient to repay said sum of Five Hundred Dollars to plaintiffs, then plaintiffs, under the terms of said contract, were to have, and said contract was to be construed as, a mortgage on said mining claim until they were fully repaid the said sum of Five Hundred Dollars.

A copy of said contract is hereto attached, marked Plaintiff's Exhibit "A," and made a part of this complaint.

III.

That, pursuant to the terms of said contract, plaintiffs Treat and Smith, on or about the 15th day of May, 1907, did advance to defendant the sum of Five Hundred Dollars, and thereafter and during the year 1907, defendant did mine from

said mining claim five tons of ore, more or less, and ship the same to the Tacoma smelter. That the returns from said shipment of ore did not pay transportation and smelter charges, and plaintiffs Treat and Smith did not receive any profit from said shipment, nor did they receive any part of said sum of Five Hundred Dollars advanced to defendant as aforesaid. That defendant was without money or means to continue mining and shipping ore from said claim, and the full sum of Five Hundred Dollars remained due and owing from defendant to plaintiffs Treat and Smith at the date of the next contract between the defendant and plaintiffs Treat and Smith, which contract is hereinafter set out.

IV.

That at the date of the next contract between defendant and plaintiffs Treat and Smith and which is hereinafter set out, the defendant was indebted to plaintiff Treat on a certain promissory note, dated December 15, 1905, for the sum of Two Hundred Dollars, bearing interest from date at the rate of twelve per cent per annum, which said note was secured by a mortgage, executed by defendant to said Treat on certain real property in the town of Valdez, Alaska, which said note was

long past due and the amount of said note and interest thereon on the 9th day of July, 1908, the date of the next contract hereinafter set out, was Two Hundred Sixty-one Dollars, which said sum was then due and owing from defendant to plaintiff Treat.

V.

That on the 9th day of July, 1908, defendant entered into a contract in writing with plaintiffs Treat and Smith in words and figures as follows, to-wit:

“CONTRACT.

THIS CONTRACT AND AGREEMENT made and entered into this 9th day of July, 1908, by and between H. E. Ellis, party of the first part, and George C. Treat and Edmund Smith, parties of the second part, all of Valdez, Alaska, WITNESSETH:

That the said party of the first part is the owner of eight (8) gold mining claims, situated on the North side of Valdez Bay and about ten (10) miles from Valdez, Alaska, the location certificates of which are of record in the office of the United States Commissioner at said Valdez, Alaska.

In consideration of the covenants hereinafter mentioned, and to be fully kept and performed by the parties of the second part, the said party of the first part agrees to deed to the Mystic Gold Mining Company, a corporation hereinafter to be formed, the said eight gold mining claims, in consideration of the issuance to him of all of the capital stock of said corporation.

That said first party will then transfer to the parties of the second part twenty (20) per cent of said capital stock, and will turn over to the Treasury of the said corporation twenty (20) per cent of said stock to be sold by said Treasury as may be directed by the board of directors of said corporation, the money received from the sale of said twenty (20) per cent of said stock being the treasury stock as aforesaid or so much thereof as may be sold to be used in establishing a reduction plant upon said mining claims and the development of said claims.

That in consideration of the twenty (20) per cent issued to the parties of the second part, the said parties of the second part are to pay all expenses of incorporating said company, recording and filing all necessary papers thereon, and receipt in full all claims that said parties of the second part, or either of them, have against the said party of the first part; also to give their time and attention in selling the amount of treasury stock necessary to be sold, and give whatever time and attention that may be necessary to the proper organization of said corporation and the sale of said stock.

IN WITNESS WHEREOF, the parties have hereunto set their hands this 9th day of July, 1908.

H. E. ELLIS,
GEO. C. TREAT,
EDMUND SMITH.

In presence of:

B. B. LOCKHART.

United States of America, Territory of Alaska, ss.

BE IT REMEMBERED that on this 9th day of July, 1908, before me, a Notary Public in and for the Territory of Alaska, personally appeared H. E. ELLIS, GEORGE C. TREAT AND EDMUND SMITH, known

to me to be the persons described in and who executed the foregoing Contract, and each duly acknowledged to me that he signed the same for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Notarial Seal)

B. B. LOCKHART,
Notary Public."

That the mining claims referred to in the foregoing contract as

"(8) gold mining claims, situate on the North side of Valdez Bay and about ten (10) miles from Valdez, Alaska, the location certificates of which are recorded in the office of the United States Commissioner at Valdez, Alaska,"

are the eight mining claims described in the first paragraph of this complaint, that the consideration of said contract heretofore in this paragraph set out, and described therein as "claims that said parties of the second part, or either of them, have against the said party of the first part," to said contract, were the sums of Five Hundred Dollars theretofore advanced by plaintiffs Treat and Smith to defendant, as aforesaid, and the promissory note heretofore described held by plaintiff Treat against defendant, the total amount of said claims being Seven Hundred Sixty-one Dollars (\$761).

VI.

That on the execution of the contract last set out, plaintiffs Treat and Smith did release defendant from and receipt to him in full for said sum of Five Hundred Dollars, and plaintiff Treat surrendered and delivered said promissory note to defendant and released him from all obligation thereon. That shortly thereafter plaintiffs Treat and Smith caused to be prepared the necessary papers for the formation of the corporation provided for in said contract, and were ready, able and willing at all times to proceed to the complete formation of said corporation, and to pay all expenses of incorporating said company and recording and filing of all necessary papers in any manner connected therewith, and to perform each and all of the other things to be done and performed by them under the terms of said contract. That it was understood and agreed at the time of the execution of said contract that each of the parties thereto was to be one of the incorporators and would sign and execute the Articles of Incorporation when it was decided to form said corporation.

That after the execution of the contract of July 9, 1908, set out in the fifth paragraph of this complaint, owing to the stringency of the money

market and the probable difficulty that would be experienced in selling the treasury stock of said corporation to an advantage, it was decided by all of the parties to said contract to await a more opportune time to form said corporation, and while so waiting, during which time plaintiffs Treat and Smith were endeavoring to procure a purchaser for the treasury stock of said corporation when the same should be organized said Treat and Smith procured from one A. J. Crane an offer to lease said mining claims. That thereupon defendant Ellis and plaintiffs Treat and Smith agreed mutually to enter into a contract with the said A. J. Crane to lease all of said mining claims to said Crane.

VII.

That, pursuant to said agreement, on the 5th day of June, 1909, defendant and plaintiffs Treat and Smith, as parties of the first part, entered into a contract with said Crane, as party of the second part, giving and granting to the said Crane an option to lease each and all of said mining claims for a period of six years, at a rent or royalty of twenty per cent of the net product or proceeds for the first year and twenty-five per cent of said net proceeds for the remaining term of said lease, and providing that eighty-five per cent of said rent or

royalty should be paid to defendant Ellis, and the remaining fifteen per cent of said royalty should be paid to plaintiffs Treat and Smith. That a copy of said contract with Crane is hereto attached, marked Plaintiff's Exhibit "B," and made a part of this complaint.

That at the time of the negotiations which resulted in the contract described as Plaintiff's Exhibit "B," the said defendant Ellis insisted on a higher rent or royalty than that named in the contract, and the said Crane refused to agree on a higher royalty, and thereupon plaintiffs Treat and Smith, believing the lease to be advantageous, agreed that defendant should have eighty-five per cent of said royalty instead of eighty per cent thereof to which percentage he was entitled at that time as the owner of eighty per cent of said mining claims, in order to induce defendant to enter into said lease.

VIII.

That thereafter by mesne conveyances B. F. Millard became assignee of the contract between plaintiffs Treat and Smith and defendant Ellis with said Crane, a copy of which contract is attached hereto and marked Plaintiff's Exhibit "B"

and thereafter on the 23rd day of July, 1909, defendant and plaintiffs Treat and Smith, as owners of each and all of said mining claims, entered into a lease of each and all of said mining claims with B. F. Millard, pursuant to the terms of the contract marked Plaintiff's Exhibit "B" heretofore referred to. That said lease to said B. F. Millard provided, among other things, that at the termination of said lease all machinery, tools, equipment and improvements placed upon said mining claims by said lessee, his successors or assigns, should, at the termination of said lease, be left upon the property and become the property of the lessors. That copy of said lease with B. F. Millard is hereto attached and marked Plaintiff's Exhibit "C", and made a part of this complaint. (See abstract page 20.)

IX.

That thereafter on the 4th day of August, 1909, the said B. F. Millard assigned and transferred said lease to the Cliff Mining Company, a corporation, and thereupon said Cliff Mining Company entered into the possession of said mining claims and operated them under said lease until on or about the 15th day of August, 1914, at which time the said Cliff Mining Company surrendered

the possession of said claims and the machinery, tools, equipment and improvements placed thereon to the lessors in said lease, to-wit, defendant Ellis and plaintiffs Treat and Smith.

X.

That during the time the said Cliff Mining Company was operating said mining claims it placed thereon a large amount of valuable mining machinery, tools, buildings and equipment, of the value of more than Thirty Thousand Dollars, which said machinery, tools, buildings and equipment are now upon said mining claims. That the plaintiffs herein, as the owners of twenty per cent interest in said mining claims, and under the terms of said lease, are now the owners of twenty per cent interest in and to said tools, machinery, buildings and equipment.

XI.

That on or about the 3rd day of January, 1913, the plaintiff Logan Archibald purchased from plaintiff Edmund Smith an undivided one-half of said Smith's interest in and to each and all of said mining claims and in and to all of the rights and privileges accruing to the said Smith by reason of

the contracts hereinbefore mentioned and set out, and said plaintiff Archibald is now and ever since on or about the said 3rd day of January, 1913, has been the owner of one-half of the interest formerly belonging to said plaintiff Smith.

XII.

That plaintiff Treat is now the owner of an undivided one-tenth interest, plaintiff Smith is the owner of an undivided one-twentieth interest, and plaintiff Archibald is the owner of an undivided one-twentieth interest in and to each and all of the said mining claims and in and to all of the machinery, tools, equipment and buildings and improvements thereon. That defendant Ellis, during all of the time hereinbefore mentioned since the execution of the contract of the 9th day of July, 1908, heretofore in the fifth paragraph of this complaint set out, until about the month of February, 1915, never questioned or disputed the right and title of plaintiff to said premises and property as herein stated, but during all of said time recognized and approved said claim of title by plaintiffs as herein stated.

XIII.

That ever since the surrender of said prop-

erty by said Cliff Mining Company to the lessors named in Plaintiff's Exhibit "C," defendant Ellis has remained without the Territory of Alaska, residing in the States of Colorado and Montana, and has refused to deed to plaintiffs an undivided twenty per cent interest in and to each and all of said mining claims, and during or about the month of February, 1915, said defendant Ellis disputed the claim of title of plaintiffs and denied that plaintiffs herein have any right, title or interest whatever in or to said mining claims, or in or to said machinery, tools, equipment, buildings and improvements. And said defendant is now threatening and attempting to transfer the title to each and all of said mining claims to parties other than the plaintiffs herein in violation of the contracts and agreements aforesaid, and is threatening to sell and remove the machinery, tools, equipment and buildings now upon said property as aforesaid without recognizing plaintiffs' right, title or interest in and to said property, or any part thereof, and unless enjoined by order of this Court defendant will make said transfer.

WHEREFORE, Plaintiffs pray a decree of this Court as follows:

First. That defendant deed to plaintiffs Treat

and Smith each an undivided one-tenth interest in and to each and all of said eight mining claims.

Second. That the plaintiffs herein be adjudged and decreed to be the owners of an undivided one-fifth interest in and to all machinery, tools, equipment, buildings and improvements placed upon said mining claims by the Cliff Mining Company, in the following proportions: Geo. C. Treat, an undivided one-tenth interest; Edmund Smith, an undivided one-twentieth interest; Logan Archibald, an undivided one-twentieth interest.

Third. That defendant, his agents, attorneys and employees, be enjoined and restrained from selling or removing any of said machinery, tools, equipment or buildings pending this suit.

Fourth. That defendant be enjoined from transferring the title of each and all of said mining claims, and from leasing or encumbering said mining claims pending the final determination of this suit.

Fifth. For such other and further relief as to the Court may seem just and equitable.

Sixth. That plaintiffs have judgment against the defendant for their costs and disbursements in this action.

DONOHUE & DIMOND, and
LYONS & RITCHIE,

Attorneys for Plaintiffs.

In the complaint as amended and as it originally stood, plaintiffs allege that they are the owners of an undivided twenty per cent or one-fifth interest in the property described in said complaint. (See Paragraph VIII and Exhibit "B" part of said paragraph, also Paragraphs IX, X, XI and XII.) Originally the complaint was in the alternative and the prayer asked for alternative relief. We believe in practically all the jurisdictions of the United States a pleading that plaintiff is the owner of the real estate which is the subject of litigation is good in the absence of a motion to make more definite and certain. The contracts were pleaded as explanatory of the various steps leading up to the final agreement at the time of the signing of the Crane contract, whereby plaintiffs were to have an interest in the specific property in lieu of the twenty per cent interest in the stock of the corporation.

The contracts are also important for the purpose of showing a consideration.

We believe also that it is practically a uniform rule in all jurisdictions that where the question of the sufficiency of the complaint to state a cause of action is raised after verdict or decision, and a trial on the merits, every reasonable presumption

will be indulged in to sustain the complaint. Another legal presumption which we believe is practically uniform, is that if the parties to the suit try the case before the Court on a certain theory, even though that theory is somewhat at variance with the issues raised by the pleadings, the trial and appellate Courts will recognize the theory upon which the case was tried and in the language of the statute render its decisions according to the facts found.

In this case the issues as to the ownership of said interest in and to said mining claims was fully set forth in the complaint and denied in the answer. (See Paragraphs 6, 8, 12 and 13 of Defendant's Answer; also Defendant's Affirmative Defense, pages 36, 39, 41, 43 and 47, Abstract.)

The case was fully tried on the theory of plaintiffs' claim of ownership of an undivided one-fifth interest in the property described in the complaint. The identity of the property being specifically admitted, the plaintiffs contending that at the time of the Crane contract the agreement of the parties was orally changed by plaintiffs waiving their rights under the agreement of July 9th, 1908, for a twenty per cent interest in the specific property. This statement is fully borne out by defend-

ant by the introduction of Defendant's Exhibit No. 9, being the letter written by plaintiffs to defendant, at his request, as to what they were willing to accept for their "one-fifth interest in the property," the defendant basing his defense on the construction of Exhibit 9.

The provisions of the Alaska Code, as to variance between the pleading and proof, is as follows:

Sec. 919. No variance between the allegation in a pleading and the proof shall be deemed material unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.

Whenever it shall be alleged that the party has been so misled that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled; and thereupon the Court may order the pleading to be amended upon such terms as may be just. (See Compiled Laws of the Territory of Alaska, 1913, and authorities cited under said section.)

Section 920 provides: When the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (And cases cited.)

The entire record herein shows that the complaint alleged the ownership of plaintiffs, which allegations were denied by the answer, and that the case was tried on the theory of plaintiffs' claim of ownership of an undivided one-fifth interest in and to the mining claims described in the complaint, and that that ownership was acquired by oral agreement in consideration of releasing the defendant from the written contracts above referred to, and that the plaintiffs remained in possession thereunder for several years; and the evidence specifically shows that all parties acted on this theory, plaintiffs paying their pro rata amount for surveying the claims for patent and the expense of litigation with an adverse claimant for a part of said property and permanent improvements placed thereon, and that the only theory considered by the trial Court or by the parties at said trial was the plaintiffs' claim of ownership, and notwithstanding the imperfection in the complaint, the trial Court, acting under the above provisions of the statute, "found the facts according to the evidence."

If it be conceded that the complaint was faulty in not specifically setting forth the plaintiffs' debarment of title, or other particulars, such defects were waived by not moving to require the complaint

to be made more definite and certain and by answering, and putting the question of ownership clearly in issue and the trial of the cause on that theory. As appears by the record, no claim or proof by defendant that he had been misled to his prejudice, it should be considered by the appellate Court that the lower Court, following the mandate of the statute, "found the facts according to the evidence."

It is clearly apparent from the evidence and the entire record in the case that defendant, after acquiescing in plaintiffs' ownership of this interest for several years, and receiving and accepting their pro rata contributions to surveys for patent, costs and expenses of suit by adverse claimants, and permanent improvements, suddenly discovered that Defendant's Exhibit 9 (Transcript, pages 237, 238) might possibly be construed as an agreement to accept the 15 per cent royalty in full satisfaction of plaintiffs' rights, and that this theory induced the defendant to attempt, at that late date, to defeat the rights of the plaintiff.

The Court in its opinion refers to the amount received by the respective parties as royalties. It will, however, conclusively appear from the evidence that the property had no known value at the time plaintiffs Treat and Smith advanced the

\$500.00, and that the use of this money on the property demonstrated the only value shown to exist prior to making the contract with Crane.

From every viewpoint, the record, and the evidence in the case, every possible equity stands in favor of plaintiffs' claim.

The complaint further alleges and proof seems conclusive that plaintiff Archibald, for a valuable consideration, purchased a one-half interest claimed by plaintiff Smith, as the lease, Exhibit "C," was of record, and stated that Smith was the owner of an undivided one-tenth interest in said property. This acknowledgement in a solemnly executed and recorded instrument certainly estopped the defendant from questioning the title of Archibald for the reason that the statement contained in the lease as to the ownership, if not sufficient to bind defendant, as to Treat and Smith, it seems should be considered a sufficient estoppel in favor of an innocent purchaser.

As counsel has just received the data for this petition from Alaska on the 9th of October, and time for filing petition for rehearing is limited to October 16th, we will omit further argument and cite a few authorities on the points above mentioned.

“A complaint which alleges that defendant (plaintiff’s landlord) prevented plaintiff from removing from his farm, and converted to his own use, so much hay and potatoes which plaintiff had cut and planted while tenant, whereby plaintiff had been damaged in the amount claimed, but fails to aver in direct terms that plaintiff is the owner and contains no valuation of articles, though bad pleading, will not be held defective after verdict.”

McKay vs. Musgrove, et al., 13 Pac. 770 (Oregon Case. Alaska Code of Procedure taken from Oregon.)

“Defendant alleges that the description of the property in the lease is too indefinite to enable the Court to enter a decree for the specific performance of the agreement to extend the lease. It is to be observed that the lots 293 and 294 are not specifically described in the contract made in February, 1901, but in the supplementary contract in September, 1902, this uncertainty was supplied by the reference to the February contract as being contracts for the leasing of the four lots mentioned. It is the rule that where a contract is ambiguous the Court will generally follow the interpretation placed upon the same by the parties themselves.”

Gorder & Son vs. Pankonin, 119 N. W. 449, citing *Davis vs. Ravenna Creamery Co.*, 48 Neb. 471, and other cases.

Thompson vs. Fire Co., 155 Fed. 548.

“The defendants’ contentions are, in substance, that the agreement between Fohey and the plaintiff, made on April 28, 1906, is so indefinite, uncertain and vague that it is not enforceable as a land contract, and that the evidence admitted by the

Court, showing the circumstances under which it was made, and the subsequent acts of the parties construing its terms by their acts, was not admissible. The written contract is certainly indefinite in several particulars, especially in respect to the description of the real estate intended to be covered by it. If the Court had no further information than that given by the writing on its face, it seems probable that it would be impossible of enforcement, because of its indefinite terms. But where parties have attempted to reduce an agreement to writing, and such writing is in some respects indefinite or ambiguous, the contract does not necessarily fail, nor will a party suing upon it be denied relief. If, by aid of evidence showing the situation and surroundings of the parties at the time, and their subsequent acts, if any, construing the terms of the writing, the Court can with reasonable certainty determine the meaning intended by the parties, the Court will not allow the contract to fall, but will construe it in the light of such evidence, and enforce its terms as so construed, if there be no other fatal objections to it. This principle is so well established that discussion of it, or citation of authorities in its support, seems hardly necessary, but reference is made to *Excelsior Wrapper Co. vs. Messenger*, 116 Wis. 549, 93 N. W. 459 (where the authorities on this general subject are collated), and to the case of *Doctor vs. Hellberg*, 65 Wis. 415, 27 N. W. 176. The Court rightly received such evidence in the present case, and there can be no doubt that the Court arrived at a correct conclusion as to the proper construction of the contract."

Inglis vs. Fohey, 116 N. W., page 858.

See also *Small vs. N. P. Ry.*, 20 Fed., page 753.

“After verdict or judgment an objection that the petition fails to state facts sufficient to constitute a cause of action is tenable only where pleading fails to allege the substance of a cause of action though demurrable before answer or judgment.”

In re First National Bank, 152 Fed. 64.

“Courts will enforce oral agreements if part or full performance on one part.”

Snowby et al. vs. Bunton, 118 Mass. 279.

Warren vs. Wood, 200 Fed. 542.

Under a contract by which defendant agreed to assign to plaintiff one-fourth interest in any mine purchased by him within a specified time the fact that defendant purchased a one-fourth interest in a mine, the ownership of which was evidenced not by the legal title, but by certificates of stock showing a beneficial interest, does not enable him to evade his obligations to plaintiff who accepts this purchase in fulfillment of the contract.

Dennison vs. Chapman, 105 Cal. 447, 39 Pac. 61.

The latter case is further analogous to the case at bar as this was an original agreement for specific interest in mining property. The Court enforced the delivery of stock of the corporation.

“The allegation that plaintiff is the owner of

property described is sufficient except in motion to make more definite and certain."

Brosnon vs. White, 136 Fed. 74 (Alaska case).

Thompson vs. Fire Co., 155 Fed. 548.

We would also respectfully call the attention of the Court to

Hoogendorn vs. Daniel, 178 Fed. 765 (Alaska case).

"Courts should enforce specific performance of contract, notwithstanding the property has largely increased in value."

Meehan vs. Nelson, 137 Fed. 731 (Alaska case).

Railroad Company vs. Coney Island, 144 N. Y. 152; 39 N. E. 17.

That by reason of lack of time as above stated, we have not prepared this petition as extensively as we should like to do if we had more time. We insist, however, that from the record in the case and the evidence adduced at the trial, the decree of the District Court of Alaska, Third Division, should be affirmed and that a rehearing should be granted herein. That if this Honorable Court still believes that the complaint is insufficient, the cause should be remanded for a new trial giving plaintiffs

an opportunity to formally amend their complaint to conform to the facts proven.

Respectfully submitted,
SMITH, NEWCOMB & WORTHINGTON,
Attorneys for Petitioners.

I, L. V. Newcomb, of Counsel for the appellees herein, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

L. V. NEWCOMB.

No. 2759

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN THREE VOLUMES.)

COLUMBIA GRAPHOPHONE COMPANY, a
Corporation,

Appellant,

vs.

SEARCHLIGHT HORN COMPANY, a Corpora-
tion,

Appellee.

VOLUME I.
(Pages 1 to 352, Inclusive.)

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

Filed

APR 4 1901

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*In the District Court of the United States for the
Northern District of California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

COLUMBIA GRAPHOPHONE COMPANY,

Defendant.

Bill of Complaint.

FOR INFRINGEMENT OF PATENT, NO. 771,441.

Now comes the Searchlight Horn Company, plaintiff in the above-entitled suit and files this, its bill of complaint against Columbia Graphophone Company, defendant, and for cause of action alleges:

1. That the full name of the plaintiff is Searchlight Horn Company, and during all the time of the infringement hereinafter complained of plaintiff was and still is a corporation created under the laws of the State of New York and having its principal place of business at the city of New York in the State of New York.

2. That prior to February 1, 1913, the full name of the defendant was Columbia Phonograph Company, General; that on February 1, 1913, the name of the defendant was changed to and ever since has been and now is Columbia Graphophone Company; that for more than six years last past said defendant has been and still is a corporation created and existing under and by virtue of the laws of the State of West Virginia and having a regular and established place of business in the Northern District of Cali-

fornia with an agent engaged in conducting such business in said district.

3. That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent law of the United States.

4. That heretofore, to wit, on October 4, A. D. 1904, the [1*] Government of the United States granted, issued and delivered to one Peter C. Nielsen letters patent of the United States for a new and useful invention, to wit, a horn for phonographs and similar machines; that said letters patent bore date October 4, A. D. 1904, and were numbered 771,441, and granted to the said Nielsen and his heirs and assigns the sole and exclusive right to make, use and vend the said invention throughout the United States of America and the territories thereof during the period of seventeen years from October 4th, A. D. 1904; that a more particular description of the invention patented in and by said letters patent will fully appear from said letters patent which are ready in court to be produced by plaintiff or a duly authenticated copy thereof and of which profert is hereby made.

5. That heretofore, to wit, on January 4th, A. D. 1907, by an assignment in writing plaintiff became and ever since has been and is now the sole owner and holder of said letters patent and all the rights thereby granted.

6. That since January 4th, A. D. 1907, plaintiff has made and sold devices covered and claimed by said letters patent and upon each of said devices has marked the word "Patented" together with the

*Page-number appearing at foot of page of original certified Record.

date and number of said letters patent.

7. That heretofore, to wit, on May 9, A. D. 1911, plaintiff herein commenced an action at law in the above-entitled court against Sherman, Clay & Company, a corporation created under the laws of the State of California and doing business in the Northern District of California, and on said last-named day filed its declaration whereby it alleged the issuance of the aforesaid letters patent No. 771,441, to Peter C. Nielsen and the ownership thereof by plaintiff since January 4, A. D. 1907, and that said Sherman, Clay & Company had infringed upon said letters patent whereby plaintiff [2] had been damaged in the sum of fifty thousand dollars and prayed that judgment be rendered against said Sherman, Clay & Company for said damages; that thereafter, to wit, on May 25, A. D. 1911, said Sherman, Clay & Company appeared in said action and filed its answer denying all the allegations in said declaration, and thereafter, to wit, within thirty days before the trial of said action filed a notice in writing under section 4920 of the Revised Statutes of the United States setting up that the said Nielsen was not the first or original or any inventor of the thing patented in and by said letters patent No. 771,441, but that long prior to the supposed invention thereof by the said Nielsen the thing patented in and by said letters patent No. 771,441, was shown, described and patented in and by certain prior letters patent of the United States and of Great Britain which were specified by given numbers, and that long prior to the supposed in-

vention by the said Nielsen the thing patented in and by said letters patent, No. 771,441, had been made, used and sold by and was known to others in this country, and the names of the persons alleged to have had such prior knowledge and use together with the places where the same was used were set up in detail in said notice; that upon the issues so joined the said action at law against Sherman, Clay & Company came on for trial before the above-entitled court and a jury, which said trial commenced on October 1, A. D. 1912, and was concluded on October 4, 1912; that evidence was introduced by both sides, and the case was fully and fairly tried on its merits and after argument by counsel on both sides was submitted to a jury for decision; that thereafter on October 4, A. D. 1912, said jury returned its verdict in favor of the plaintiff in said action and against Sherman, Clay & Company, the defendant therein, and assessed damages in favor of said plaintiff [3] and against the said defendant at the sum of \$3,578; that thereupon a judgment was duly made and entered in favor of the said plaintiff and against the said Sherman, Clay & Company, defendant in said action, for the said sum of \$3,578 and costs of suit; that thereafter in due season defendant in said action duly and regularly petitioned said Court for a new trial and after arguments of counsel and due consideration of the matter said Court denied said motion for a new trial; that thereafter the plaintiff in the said suit voluntarily remitted from the amount of said damages all of said damages over and

above the sum of \$1, and the said judgment has never otherwise been changed, altered or modified but is still in full force and effect.

8. That continuously during six years last past the defendant herein without the license or consent of plaintiff, in the Northern District of California and elsewhere, has used and sold and is now using and selling horns for phonographs containing and embracing the invention patented in and by the said letters patent No. 771,441, and thereby has infringed and is now infringing upon said letters patent.

9. That by reason of the infringement aforesaid, the defendant has realized profits and the plaintiff has suffered damages, but the amount of such profits and damages is unknown to plaintiff and can be ascertained only by an accounting.

10. That the plaintiff has requested the defendant to desist from further infringement of said letters patent and to account to plaintiff for the damages suffered by plaintiff and the profits realized by defendant from and by reason of said infringement, but the defendant has failed and refused to comply with the said request or any part thereof, and is now extensively selling said infringing horns.
[4]

11. That the defendant threatens and intends to continue the said infringement and unless restrained therefrom by this court will continue to so infringe, whereby plaintiff will suffer great and irreparable injury, for which it has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays:

First. That upon the filing of this bill a preliminary injunction be granted enjoining and restraining the defendant, its officers, agents, servants, employees, pending the suit and until the further order of the Court from making, using or selling, or threatening, advertising or offering to make, use or sell any horns for phonographs containing the invention patented in and by said letters patent No. 771, 441, and from infringing upon said letters patent in any manner whatever or aiding or abetting or contributing to any such infringement.

Second. That upon the final hearing the defendant, its officers, agents, servants and employees, be permanently and finally enjoined and restrained from making, using or selling any horns for phonographs or other machines containing the invention patented in and by the said letters patent No. 771,441, and from threatening or advertising or offering to make, use or sell any such horns and from infringing upon said letters patent in any manner whatever, or aiding, abetting or contributing to any such infringement, and that the writ of injunction accordingly be issued out of and under the seal of this court enjoining the defendant, its officers, agents, attorneys, servants and employees as aforesaid.

Third. That it be ordered, adjudged and decreed that the plaintiff have and recover from the defendant the profits realized by the defendant and the damages sustained by the plaintiff from and by reason of the infringement aforesaid, together with

costs [5] of suit and such other and further relief as to the Court may seem proper and in accordance with equity and good conscience.

Fourth. That upon the filing of this bill the writ of subpoena ad respondendum be issued, directed to Columbia Graphophone Company, the defendant herein, commanding it to appear and answer this bill of complaint in accordance with the rules of the court.

SEARCHLIGHT HORN COMPANY.

By JOHN H. MILLER and

W. K. WHITE,

Solicitors for Plaintiff.

JOHN H. MILLER and

W. K. WHITE,

Of Counsel for Plaintiff,

Crocker Building,

San Francisco, California.

United States of America,

Southern District of New York,

City and County of New York,—ss.

W. H. Locke, Jr., being duly sworn, deposes and says that he is an officer, to wit, President of Searchlight Horn Company, plaintiff, in the within-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true; that the reason this verification is made by deponent and not by the plaintiff is that

the plaintiff herein is a corporation.

WILLIAM H. LOCKE, Jr.

Subscribed and sworn to before me this 11th day of June, 1913.

[Seal] M. J. DEERY,
Notary Public (23), New York Co. [6]
No. 29,024.

State of New York,
County of New York,—ss.

I, William F. Schneider, clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify that M. J. Deery before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county, the 11 day of June, 1913.

[Seal] W. F. SCHNEIDER,
Clerk.

[Endorsed]: Filed July 24th, 1913. W. B. Mal-
ing, Clerk. [7]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY—No. 30.

ON NIELSEN HORN PATENT NO. 771,441.
SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

COLUMBIA GRAPHOPHONE COMPANY,
Defendant.

Answer.

The Answer of the above-named defendant, Columbia Graphophone Company, to the Bill of Complaint of the above-named plaintiff.

The defendant herein, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and insufficiencies in said plaintiff's Bill of Complaint contained, for Answer to the whole of said Bill or to so much or such parts thereof as it is necessary and material for this defendant to answer unto, answering says:

I.

The defendant is not advised, save by the Bill, as to the truth of the allegations of paragraph 1 thereof; and therefore calls upon complainant for full proof thereof.

II.

Defendant does not deny the allegations of paragraph 2 of the Bill.

III.

Defendant does not deny the allegations of paragraph 3 of the Bill. [8]

IV.

Defendant does not deny the issuance, on October 4, 1904, of a patent bearing the number 771,441, and purporting to be granted to one Peter C. Nielsen for improvements in horns for phonographs or similar machines; but defendant denies that said patent sets forth anything novel or patentable, and denies that said patent is valid in any material or substantial respect. And, upon information and belief, the defendant asserts that a horn made in strict conformity with all the disclosures of the Nielsen Patent in suit presents no acoustical advantage whatever over the ordinary and well known horn of the same dimensions but not containing any of the features alleged or supposed to be novel with the said Nielsen Patent; and that the said features of supposed novelty set forth by the said Nielsen Patent are merely common expedients, and were all of them well-known to ordinary mechanics in that art long before the alleged invention thereof by said Nielsen. And, upon information and belief, the defendant denies the remaining allegations of said paragraph 4.

V.

Defendant is not advised, save by the Bill, as to the truth of the allegations of paragraph 5 thereof,

and therefore calls upon complainant for full proof of the same.

VI.

Defendant has no knowledge as to the truth of the allegations of paragraph 6 of the bill; but, upon information and belief denies the same.

VII.

Only by the allegations of the Bill and by hearsay (if at all) is defendant advised of the matters set forth in paragraph 7 of the Bill; and therefore calls upon complainant for full proof of the same. But defendant has been informed and believes, and [9] therefore avers, that upon petition of Sherman, Clay & Co. (the defendant referred to in said paragraph 7) the Court held that unless this complainant should accept nominal damages only, a new trial would be granted; and that it was for that reason that this complainant remitted the amount of damages as set forth in said paragraph 7. Moreover, this defendant has been further advised and believes, and therefore avers, that by Writ of Error the action against Sherman, Clay & Company (referred to in said paragraph 7) has been carried to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, and that said Court is expected to hear argument upon said Writ of Error within a few weeks, whereupon it is expected that said Court of Appeals will reverse the judgment referred to in said paragraph 7.

VIII.

Defendant does not deny that it has been selling

phonograph horns in this district and elsewhere; but defendant has been advised and believes, and therefore avers, that no horn sold by it contains and embraces any novel and patentable invention claimed or patented, or purporting to be claimed or patented, in and by the Nielsen Patent here in suit.

IX.

By reason of the foregoing, defendant says it should not be called on to make any answer to paragraph 9 of the Bill.

X.

By reason of the foregoing, defendant says it should not be called on to make any answer to paragraph 10 of the Bill.

XI.

By reason of the foregoing, defendant says it should not be called on to make any answer to paragraph 11 of the Bill. [10]

And, without waiving any of the matters and things set forth, but repeating and insisting upon the same, this defendant, further answering, says:

XII.

That this defendant has been informed, and believes, and therefore avers, that the said Nielsen Patent is null and void, because the matters and things patented or purporting to be patented therein, were not patentably novel in view of the state of the art set forth in paragraph XIV of this Answer; that the matters and things claimed in said Nielsen Patent and all material and substantial parts thereof were merely ordinary mechanical expedients and were well known to ordinary workmen long prior to Niel-

sen's supposed invention thereof, and did not involve or constitute invention; and that a horn containing the supposedly novel features of said Nielsen Patent does not produce any new or useful or improved results, or any results different from those of horns found in the prior art.

XIII.

Defendant has been advised, and believes, and therefore avers, that by reason of limitations placed upon the claims of said Nielsen Patent, during the prosecution of the application therefor in the United States Patent Office, the owner of said patent is estopped to assert therefor a construction sufficiently broad to include any horns used or sold by this defendant; and that, for the purpose of deceiving the public, the description of the alleged invention presented to the Patent Office (in the application for the patent in suit) was made to contain less than the whole truth relative to the alleged invention or discovery, or more than was necessary to produce the desired result (which result is produced equally well by any ordinary horn of the prior art); that the alleged invention purporting to be patented by the said Nielsen [11] Patent was, at the time of said Nielsen's alleged invention, and is now, without utility; and that whatever utility may be attributed to a horn constructed in full accordance with all the disclosures of said Nielsen Patent, is found equally well and to the same extent in any horn of the prior art of the same material and dimensions but *not* containing any of the features set forth as novel by the said Nielsen Patent.

XIV.

And, in view of the state of the art as below set forth, this defendant says that the Nielsen Patent in suit, and each and every claim thereof, never possessed novelty, or utility, or the quality of invention; and that said patent is therefore invalid in all respects. The state of the art is set forth in and by the following letters patent and printed publications, to wit: [12]

UNITED STATES PATENTS.

Number.	Name.	Date.
982,	Wyberd, (Reissue),	June 12, 1860;
8,824,	Shirley, (Design),	Dec. 7, 1875;
10,235,	Cairns, (Design),	Sept. 11, 1877;
12,442,	Villey, (Reissue),	Jan. 30, 1906;
16,044,	Bailey, (Design),	April 14, 1885;
17,627,	Carr, (Design),	Aug. 16, 1887;
19,977,	Miller,	July 1, 1890;
26,640,	Valdwell, (Design),	Feb. 16, 1897;
29,791,	Pieri, (Design),	Dec. 13, 1898;
30,653,	Littledale, (Design),	May 2, 1899;
34,907	McVeety & Ford, (Design),	Aug. 6, 1901;
72,422,	Saxton,	Dec. 17, 1867;
165,912,	Barnard,	July 27, 1875;
181,159	C. W. Fallows,	Aug. 15, 1876;
186,718,	Einig,	Jan. 30, 1877;
187,589,	Boesch,	Feb. 20, 1877;
216,188,	Irwin & Reber,	June 3, 1879;
229,212,	Vance,	June 22, 1880;
240,038,	Powelson & Daves,	April 12, 1881;
240,868,	Waters & Waters,	May 3, 1881;
274,930,	Frink,	April 3, 1883;

Number.	Name.	Date.
276,251,	Lesson,	April 24, 1883;
320,424,	Woodward,	June 16, 1885;
337,971,	McLaughlin,	March 16, 1866;
362,107,	Penfield,	May 3, 1887;
406,332,	Bayles,	July 2, 1889;
409,196,	Hart,	Aug. 20, 1899;
[13]		
427,658,	Bayles,	May 13, 1890;
453,798,	Gersdorf,	June 9, 1891;
455,910,	Gordon,	July 14, 1891;
491,421,	Gersdorf,	Feb. 7, 1893;
534,543,	Berliner,	Feb. 19, 1895;
578,737,	Haas,	Mar. 16, 1897;
609,983,	Wolhaupter,	Aug. 30, 1898;
612,639,	Clayton,	Oct. 18, 1898;
632,015,	Hogan,	Aug. 29, 1899;
647,147,	Meyers,	Apr. 10, 1900;
648,994,	Porter,	May 8, 1900;
651,368,	Lanz,	June 12, 1900;
679,659,	Wolhaupter,	July 30, 1901;
692,363,	Runge,	Feb. 4, 1902;
693,460,	Takaba,	Feb. 18, 1902;
699,928,	McVeety & Ford,	May 13, 1902;
701,377,	Norcross,	June 3, 1902;
705,126,	Osten & Spalding,	July 22, 1902;
712,517,	Gates,	Nov. 4, 1902;
738,342,	Marten,	Sept. 8, 1903;
739,954,	Villey,	Sept. 29, 1903;
748,969,	Melville,	Jan. 5, 1904;
758,716,	Storrs,	May 3, 1904;
763,808,	Sturges,	June 28, 1904;

Number.	Name.	Date.
769,410,	Schoettel,	Sept. 6, 1904;
770,024,	Ruggiero & Bongiorno,	Sept. 13, 1904;
798,876,	Conger, et al.	Sept. 5, 1905;

UNITED STATES REGISTERED TRADE-
MARK.

31,772,	Kaiser,	July 5, 1898;
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[14]

BRITISH PATENTS.

9,762,	of July 5, 1888,	to Randall,
22,612,	of Nov. 13, 1899,	to Hogan,
7,594,	of Apr. 24, 1900,	to Thompson,
9,727,	of May 10, 1901,	to Runge,
22,273,	of Nov. 5, 1901,	to Runge,
17,786,	of Aug. 13, 1902,	to Fairbrother,
20,146,	of Sept. 15, 1902,	to Villey,
20,567,	of Sept. 20, 1902,	to Tourtel,
5,183,	of March 5, 1903,	to Cockman,
14,730,	of July 2, 1903,	to Tourtel,

FRENCH PATENTS.

31,470,	L. Scott, and certificate of addition thereto, July 29, 1859,	Mar. 25, 1857;
301,583,	Guerrero,	June 23, 1900;
318,742,	Turpin,	Feb. 17, 1902;
321,507,	Runge,	May 28, 1902;
331,566,	Hollingsworth,	April 28, 1903;

BELGIAN PATENTS.

157,009,	Runge,	June 10, 1901;
163,518,	Runge,	May 27, 1902;
175,354,	Aneion,	Jan. 29, 1904;
175,785,	Combret,	March 1, 1904;
176,179,	Sieger,	March 19, 1904;
[15]		

PRINTED PUBLICATIONS.

The Electrical World, published at New York, N. Y., article on "Berliner's Gramophone," pp. 255-256, issue of Nov. 12, 1887, and article of "The Improved Gramophone," p. 80, issue of August 18, 1888.

A paper read before the Franklin Institute, May 16, 1888, on the Gramophone, by Emile Berliner, published in the Journal of the Franklin Institute at Philadelphia, Pa., June, 1888, and by Rufus H. Darby, printer, in 1894, at Washington, D. C., and many other publications describing Scott's Phonautograph of 1857.

The Metal Workers Pattern Book, by A. O. Kittredge, 3d Edition, published in New York, N. Y., 1884, by David Williams, Printer.

The Metal Worker, a periodical, published at New York, N. Y., September 1, 1900, pp. 50-56 inclusive thereof.

—and in many other prior patents and printed publications, whose respective names, dates and numbers, and whose respective titles, publishers and places of publication, are at this time unknown to this defendant, but which when discovered it prays leave to set forth by amendment to this Answer.

XV.

And, answering further upon information and belief, this defendant says that the alleged improvements and inventions set forth by said Nielsen Patent, and all material and substantial parts thereof, were well known to and publicly used by others, and were on sale, within the United States long prior to the alleged invention thereof by the said Nielsen, and for more than two years before his application for the patent in suit, to wit, by each of the patentees and other persons named in and by the various patents and printed publications set forth in paragraph XIV of this Answer,—at the several places named in said patents as the residence of the respective patentees, and elsewhere within the United States, the last known addresses of whom are those set forth in said patents and printed publications; and also by the following, at the places recited opposite each name and elsewhere within the United States, whose last known addresses are those below given, to wit:
[16]

Name.	Address.
C. D. Emerson,	New York, N. Y.
Gianni Bettini,	New York, N. Y.
Bettini Phonograph Co.,	New York, N. Y.
John Kaiser,	New York, N. Y.
C. A. Senne,	New York, N. Y.
Henry Staude,	New York, N. Y.
Edward A. Merrit,	New York, N. Y.
Walcutt, Miller & Co.,	New York, N. Y.
Cleveland Walcutt,	New York, N. Y.

Name.	Address.
Ellsworth A. Hawthorne,	Phila., Pa. (of Bridgeport, Conn.)
Horace Sheble,	Philadelphia, Pa.
Bartolo Ruggiero, & Gaetano Bongiorrio,	Brooklyn, N. Y.
Hollister Sturges,	New York, N. Y.
John W. George,	Phila., Pa. (of Bridgeport, Conn.)
George S. Saxton,	St. Louis, Mo.
William H. Barnard,	Sedalia, Mo.
Charles W. Fallows,	Philadelphia, Pa.
Emil Boesch,	San Francisco, Cal.
Thomas W. Irwin,	Allegheny, Pa.
George K. Reber,	Pittsburgh, Pa.
Nathaniel C. Powelson,	Brooklyn, N. Y.
Charles Deavs,	New York, N. Y.
Isaac P. Frink,	New York, N. Y.
Philip Lesson,	Newark, N. J.
George W. Woodward,	Brooklyn, N. Y.
Henry McLaughlin,	Bangor, Me.
Charles R. Penfield,	Rochester, N. Y.
James C. Bayles,	New York, N. Y.
Charles L. Hart,	Brooklyn, N. Y.
Augustus Gersdorff,	Bridgeton, N. J.
William J. Gordon,	Philadelphia, Pa.
Augustus Gersdorff,	Washington, D. C.
Philip J. Hass,	Marengo, Ia.
James Clayton,	New York, N. Y.
Major D. Porter,	New Haven, Conn.
John Lans,	Pittsburgh, Pa.
Charles McVeety,	Philadelphia, Pa.
John F. Ford,	Philadelphia, Pa.

Name.	Address.
George Osten,	Denver, Col.
William P. Spaulding,	Denver, Col.
Albert S. Martin,	E. Orange & Newark, N. J.
Frederick S. Shirley,	New Bedford, Mass.
Edward Cairns,	Morristown, N. J.
Walter H. Miller (of Orange, N. J.),	New York, N. Y. & W. Orange, N. J.
Alex. N. Pierman (of Newark, N. J.),	W. Orange, N. J.
Edward M. Meeker (of Orange, N. J.),	W. Orange, N. J.
Harvey N. Emmonds,	E. Orange, N. J.
Arthur Collins (of New York, N. Y.),	W. Orange, N. J.
John Riley,	W. Orange, N. J.
James Burns,	W. Orange, N. J.
Frederick S. Brown (of Montclair, N. J.),	W. Orange, N. J.
C. J. Eichhorn,	Newark, N. J.
John Sanderson,	Pittsburgh, Pa.
Harry Betzler,	Pittsburgh, Pa.
Leonard Terhune (of Orange, N. J.),	Newark, N. J.
George C. Magill,	Newark, N. J.
Peter Schoepple,	Newark, N. J.
John H. B. Conger,	Newark, N. J.
Thomas H. Brady,	New Britain, Conn.
August Doig,	New Britain, Conn. [17]
William J. Noble,	New Britain, Conn.
James Connelly,	New Britain, Conn.
Noble & Brady, and their employees,	New Britain, Conn.

Tea Tray Co., and their employees, Newark, N. J.

Thomas A. Edison, Edison Phonograph Works and National Phonograph Co., and their employees, Orange, N. J.

New Jersey Phonograph Co., and their employees, Newark, N. J.

North American Phonograph Co., and their employees, Jersey City, N. J.

—and by many others, at this time not known to this defendant, but whose names and locations when discovered it prays leave to set forth by amendment to this Answer.

XVI.

This defendant says that it has never manufactured, or caused to be manufactured, any talking-machine horns whatever; and that all the horns used or sold by it during the past seven years were procured from one of two sources only, to wit, either from the Hawthorne Manufacturing Co. of Bridgeport, Connecticut, or its predecessor Ellsworth A. Hawthorne of said Bridgeport, or his predecessor the Hawthorne & Sheble Manufacturing Co. of Philadelphia, or its predecessor the firm of Hawthorne & Sheble of Philadelphia, or from the National Metal Stamping and Manufacturing Co. of Newark, New Jersey, or its predecessor the Tea Tray Co., of said Newark, and from no other source whatever. And this defendant has been advised and believes, and therefore avers, that during and prior to the year 1906 and continuously ever since, said Hawthorne concerns and said Tea Tray Co. (and its successor), and also the Standard Metal Mfg. Co. of Newark, New Jersey,

have been and now are openly and notoriously manufacturing and selling,—and this defendant and the Victor Talking Machine Co. of Camden, [18] New Jersey, and the Edison companies of West Orange, New Jersey, have been and now are openly and notoriously using and selling phonograph horns substantially the same in all respects as the horns understood to be complained of herein; and that the parties aforesaid have continued to the present time thus to deal in the said horns as aforesaid, at all times to the full knowledge of this plaintiff and of the United States Horn Co. (from whom plaintiff is understood to derive its alleged title to the Nielsen Patent in suit) and without any protest or objection whatever on the part of the owner of said Nielsen Patent except as set forth below, to wit, (1) on or about February 10, 1906, said United States Horn Co. represented itself to said Hawthorne and Sheble concern as the owner of said Nielsen Patent, and asserted that said patent was being infringed by said Hawthorne and Sheble and by said Tea Tray Co. and by certain other manufacturers, and suggested that said alleged infringers should unite in acquiring said Nielsen Patent or rights thereunder; and that said Hawthorne and Sheble, after investigation, replied that said Nielsen Patent was invalid and of no force and effect in law, and that they would continue the manufacture and sale of the horns aforesaid without paying any further attention to said Nielsen Patent; and (2) that as early as May, 1906, said United State Horn Co. asserted to said Victor Talking Machine Co. that the former owned

said Nielsen Patent and that the latter was infringing the same, and demanded that said Victor Talking Machine Co. desist from the alleged infringements, and threatened patent suit in case of refusal; but that said Victor Co., after investigating said Nielsen Patent, paid no further attention to the same; and that thereafter to the present time said horn manufacturers have not been interfered with by this plaintiff or its supposed predecessor in title. [19]

XVII.

That, in view of the long-continued course of dealing above set forth, and at all times well known to this plaintiff and its predecessor in title, defendant has long since been led to believe, and was justified in believing, that said Hawthorne and Sheble and said Tea Tray Co. had the perfect right to manufacture the horns aforesaid and to sell the same, and that this defendant had the perfect right to acquire and use and sell the same without interference by any patent owner, and that, relying upon the consistent conduct aforesaid of said United States Horn Co. and this plaintiff during all the period aforesaid, and their said acquiescence in the putting out of said horns, this defendant was induced to expend and did expend large sums of money in acquiring for the benefit of its customers the horns understood to be now complained of, and in delivering the same to them; and that said horns were so sold because of their attractive dress and appearance, and not because of superior acoustic quality. Wherefore, this defendant says that it is contrary to equity and

good conscience for complainant to maintain against it this suit in equity, or to obtain an injunction or an accounting or any other relief whatever.

Wherefore, and for the causes aforesaid, this defendant denies the equity of complainant's bill herein, and all manner of wrongful and unlawful acts wherewith in the said bill of complaint it is charged, and further, denies the right of the complainant to the relief, and each and every part thereof, alleged against this defendant in said bill of complaint, and submit it should not be compelled to make any other or further answer than that herein contained. [20]

All of which matter and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

COLUMBIA GRAPHOPHONE COMPANY,

By GEO. W. LYLE.

Attest:

[Seal] C. W. WOODROP,

Secretary.

C. A. L. MASSIE,

Woolworth Bldg., N. Y. City,

Of Counsel for Defendant.

State of New York,

County of New York,—ss.:

George W. Lyle, being duly sworn, deposes and says, that he is of lawful age, is a resident of Hackensack, New Jersey, and is vice-president of the Columbia Graphophone Company, the defendant named in the bill of complaint herein; that he has

read the said answer subscribed by him as vice-president of the defendant company and knows the contents thereof; that the same are true of his own knowledge, except as to the matters stated to be alleged on information and belief, and as to those matters he believes it to be true.

GEO. W. LYLE,

Subscribed and sworn to before me, this 11th day of October, 1913.

[Seal]

RALPH L. SCOTT,

Notary Public, New York County.

[Endorsed]: Filed October 20, 1913. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[21]

(Title of Court and Cause.)

Notice of Motion to Amend Answer.

To the Above-named Plaintiff and to John H. Miller, Esq., Solicitor, for Plaintiff:

Please take notice that on Monday, the 16th day of August, 1915, at the District Court of the United States, Northern District of California, Second Division, in the courtroom of said court, in the Post-office Building, in the city and county of San Francisco, State of California, at the hour of ten o'clock A. M. or as soon thereafter as counsel can be heard, the said defendant, Columbia Graphophone Company, will move for leave to amend the answer in accordance with the annexed motion.

Said motion will be based upon this notice and all the records, proceedings and files herein, the rules of

this Court, and the new Equity Rules.

Dated August 12, 1915.

CHAS. E. TOWNSEND,
C. A. L. MASSIE,
Solicitors for Defendant. [22]

(Title of Court and Cause.)

Motion to Amend Answer.

Now comes the defendant in the above-entitled cause and moves this Honorable Court for leave to amend the Answer heretofore filed herein in the following particular, to wit:

On page 12, paragraph XV, by adding the following names and residences of the persons and parties having prior knowledge of the thing patented and of the alleged improvements described and claimed in Letters Patent No. 771,441 sued on:

Adolph Hammer, of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere;

George Dimling, Jr., of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere;

Leo F. Ley, of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere;

Anna Meyer, of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere;

Charles E. Sutter, of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere;

H. P. Keely, of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere;

G. E. Sutter, of Bellevue, Pa., at Pittsburg, Pa., and elsewhere;

Alexander Hudson, of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere;

Gustave Hammer, of Bellevue, Pa., at Pittsburg, Pa., and elsewhere;

Frank J. Kleber, of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere; [23]

T. F. McCausland, of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere;

D. S. Hartley, of Bellevue, Pa., at Pittsburg, Pa., and elsewhere;

said parties, and each of them, having knowledge of the use and having used said alleged invention of the patent sued on at the respective places mentioned and more than two years prior to the application for said Letters Patent No. 771,441.

That said amendment is material and necessary to a proper defense of the case and the matters set up by way of amendment were not known to defendant prior to filing the original answer.

Said motion is further made on the ground that the said amendment is made in line with the concluding paragraph of said paragraph XV of the original answer; and the further ground that the said amendment includes the names of those witnesses whose depositions have been taken in another cause pending in this court involving issues identical to those raised herein, and which depositions it has been stipulated, although taken in said other cause, could be used in the cause herein with like force and effect as though taken pursuant to notice herein; and upon the further ground that amendment is necessary to conform with the proofs of defendant; and upon the

further ground that justice requires the amendment as herein prayed and that it is in accordance with the rules of practice in this court that said pleadings should be so amended.

WHEREFORE defendant prays that said amendment be allowed and be considered as a part of the answer on the hearing of the cause.

Dated August 12, 1915.

CHAS. E. TOWNSEND,
C. A. L. MASSIE,
Solicitors for Defendant. [24]

(Title of Court and Cause.)

Affidavit of Charles E. Townsend.

State of California,
City and County of San Francisco,—ss.

Charles E. Townsend, being first duly sworn, deposes and says that he is one of the solicitors of the defendant in the above-entitled cause; that he knows that the statement of facts set out in the accompanying motion, and that the grounds specified for said motion, are true and correct; that said motion is further essential for the reason that the proofs heretofore taken and relied upon by defendant may conform with Section 4920 of the U. S. Revised Statutes; and that there is now on file in this court a stipulation between the parties in words as follows, to wit: [25]

(Title of Court and Cause.)

**Stipulation Regarding Admission of Evidence at
the Trial.**

It is hereby stipulated and agreed by and between the parties to the above-entitled suit as follows:

1. That at the trial printed, uncertified copies of U. S. and foreign letters patent may be used in evidence with the same force and effect as the originals or as certified copies, and that the date of issuance appearing on the same respectively shall be deemed to be and taken as the actual date of issuance thereof, and subject, however, to correction in case of error found.

2. That certified copies of assignments constituting plaintiff's chain of title, duly certified by a Commissioner of Patents of the United States, may be used in evidence with same force and effect as the originals subject to correction in case of error found.

3. That subject to any objection that may be made as to incompetency, irrelevancy, immateriality or other grounds of inadmissibility, either party may offer in evidence at the trial as part of its record in this case any or all depositions, exhibits, testimony or other evidence offered by either party in the Equity Suit No. 15,623, of this plaintiff against Sherman, Clay & Company, now pending in the District Court of the United States for the Northern District of California, Second Division, or in the Equity Suit, No. 18, of this plaintiff against the Pacific Phonograph Company now pending in the

same court, or in Equity Suit No. 394 of this plaintiff against the Victor Talking Machine Company now pending in the United States District Court for the District of New Jersey, and the same when so offered and received in evidence [26] in this case shall constitute and be part and portion of the proofs, exhibits, testimony and evidence of the party so offering the same herein, with the same force and effect as if the same had been originally taken and offered in the case at bar.

4. That within six years prior to the commencement of this suit in the Northern District of California and elsewhere in the United States, defendant sold horns for phonographs or graphophones similar in all respects to the two horns referred to in the affidavit of W. H. Locke, Jr., on motion for preliminary injunction and stated in said affidavit to have been purchased by him on October 4, 1913, from Columbia Graphophone Company at New York City; and that within six years prior to the commencement of this suit defendant issued and circulated catalogues entitled: "Columbia Graphophones" M-250 of which a copy is hereunto annexed, and showing at pages 11, 13, 15, 21, 35, 37, 39 and 41 cuts and illustrations of horns sold by defendant.

5. It is also stipulated and agreed that at all the times mentioned in the Bill of Complaint, the United States Horn Company and plaintiff were and are corporations created under the laws of the State of New York and that the defendant was and is a corporation created and existing under the laws of the State of West Virginia.

Dated this 10th day of June, 1915.

JOHN H. MILLER,

Solicitor for Plaintiff.

C. A. L. MASSIE,

CHAS. E. TOWNSEND,

Solicitors for Defendant.

So ordered:

_____ ,

Judge.

Further deponent saith not.

CHAS. E. TOWNSEND.

Subscribed and sworn to before me this 13th day of August, 1915.

[Seal]

W. W. HEALEY,

Notary Public in and for the City and County of
San Francisco, State of California. [27]

Copy of the within Notice and Motion to Amend Answer and Affidavit of Chas. E. Townsend, left with office of J. H. Miller, Atty. for Plaintiff this 13th day of August, A. D. 1915.

CHAS. E. TOWNSEND,

For Defendant.

[Endorsed]: Filed Aug. 13, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

(Title of Court and Cause.)

**Stipulation and Order Extending Time to Take
Depositions.**

WHEREAS, in the Circuit Court of Appeals of the United States, appeals are now pending in three suits brought by this same plaintiff against other

parties for the alleged infringement of the same patent that is involved herein, which said appeals have been argued and submitted and are likely to be decided at the February, 1914, term of the said court; and

WHEREAS, the decisions in said cases may have some influence in the matter of taking testimony herein, and the parties have mutually agreed to extend the time allowed by law for taking depositions under the Revised Statutes until after decisions of said appeals;

NOW, THEREFORE, it is stipulated and agreed by and between the parties hereto as follows:

1. That the plaintiff shall have until and including February 28, 1914, in which to take depositions under Sections 863, 864 and 865 of the United States Revised Statutes.

2. That the defendant shall have until and including April 10, 1914, in which to take depositions under said sections.

3. That plaintiff shall have until and including May 10, 1914, in which to take rebuttal depositions under said sections.

Provided that if the said Circuit Court of Appeals shall not have decided *that* said appeals. as anticipated, at said February, 1914, term of said court, then and in that event each of the times hereinabove provided shall be respectively and correspondingly extended thirty (30) days each; and if at the end of the thirty (30) days thus further allowed defendant, said decisions [29] are not yet forthcoming, there shall be a further extension of the times of the re-

spective parties of a like period and so on, and a reasonable time shall in any event be allowed each party to take depositions after the rendering of said decisions.

It is understood and agreed that this stipulation refers to the taking of depositions for final hearing and is without prejudice to the right of the plaintiff to move for a preliminary injunction in said suit, and in case such motion is made this stipulation shall not be used by defendant against plaintiff in opposition to said motion.

MILLER & WHITE,
Attorneys for Plaintiff.

C. A. L. MASSIE,
By CHAS. E. TOWNSEND,
Attorney for Defendant.

Dated January 6, 1914.

So ordered:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jan. 9, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

(Title of Court and Cause.)

**Stipulation and Order Extending Time to Take
Testimony.**

In accordance with the Stipulation of January 6, 1914, there having been no Opinion yet rendered by the Circuit Court of Appeals in the cases therein referred to, it is hereby stipulated and agreed that the defendant shall have until and including May 10,

1914, in which to take depositions, and plaintiff shall have until and including June 10, 1914, in which to take rebuttal depositions.

Dated April 9, 1914.

MILLER & WHITE,

Attorneys for Plaintiff.

C. A. L. MASSIE,

By CHAS. E. TOWNSEND,

Attorney for Defendant.

So ordered:

M. T. DOOLING,

Judge.

[Endorsed]: Filed April 13, 1914. Walter B. Maling, Clerk. [31]

(Title of Court and Cause.)

Stipulation and Order Extending Time [to May 10, 1914] to Take Depositions, etc.

In accordance with the Stipulation of January 6, 1914, and the recent rendition of the opinions by the Circuit Court of Appeals in the cases therein referred to, it is hereby stipulated and agreed that the defendant shall have until and including June 10, 1914, in which to take depositions, and plaintiff shall have until and including July 10, 1914, in which to take rebuttal depositions, without prejudice to plaintiff's right to move for a preliminary injunction.

Dated May 11th, 1914.

MILLER & WHITE,
Attorneys for Plaintiff.
C. A. L. MASSIE,
CHAS. E. TOWNSEND,
Attorneys for Defendant.

So ordered:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed May 14, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

(Title of Court and Cause.)

**Stipulation Extending Time [to June 10, 1914], for
Taking Depositions by Defendant and Plaintiff.**

In accordance with the Stipulation of January 6, 1914, and the recent rendition of the opinions by the Circuit Court of Appeals in the cases therein referred to, it is hereby stipulated and agreed that the defendant shall have until and including July 10, 1914, in which to take depositions, and plaintiff shall have until and including August 10, 1914, in which to take rebuttal depositions.

Dated May 29th, 1914.

MILLER & WHITE,
Attorneys for Plaintiff.
C. A. L. MASSIE,
By CHAS. E. TOWNSEND,
Attorneys for Defendant.

So ordered:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jun. 9, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

(Title of Court and Cause.)

**Stipulation Extending Time [to July 10, 1914] for
Taking Depositions, etc.**

In accordance with the stipulation of January 6, 1914, and in view of the recent rendition of the opinions by the Circuit Court of Appeals in the cases therein referred to, it is hereby stipulated and agreed that the defendant shall have until and including September 1st, 1914, in which to take depositions, and plaintiff shall have until and including October 1st, 1914, in which to take rebuttal depositions. This stipulation is without prejudice to plaintiff's right to move for a preliminary injunction.

Dated San Francisco, June 24, 1914.

MILLER & WHITE,

Attorneys for Plaintiff.

C. A. L. MASSIE,

CHAS. E. TOWNSEND,

Attorneys for Defendant.

So ordered:

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Jun. 25, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [34]

[Stipulation and Order Extending Time to September 1, 1914, to Take Depositions, etc.]

(Title of Court and Cause.)

To C. A. L. Massey, Solicitor for Defendant:

TAKE NOTICE that on July 27, 1914, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, plaintiff in the above-entitled suit will move this Court at the courtroom thereof in the city and county of San Francisco, State of California, for an order granting to plaintiff a preliminary injunction, enjoining and restraining defendant, its officers, agents, servants, employees, and all others acting in privity with the defendant, until the final hearing, from making, using, or selling, or offering, or advertising, or threatening to make, use or sell, any horn or horns for phonographs, either attached to and connected therewith, or separate and disconnected from any phonograph, or other instrument, containing and embodying the invention described in the specification of U. S. letters patent No. 771,441, and claimed in and by claims two and three thereof, and from infringing upon said claims or either of them, in any manner whatever, and from aiding or abetting or contributing to any such infringement, and particularly from making, using, or selling, or offering, or advertising, or threatening to make, use or sell, any horn or horns for phonographs such as those heretofore and now being sold, advertised and offered for sale and dealt in by defendant, in connection with or as a part of, or appurtenant to the phonographs or graphophones sold and dealt in by de-

fendant and styled respectively, the "Bijou" (type B. Z.), the "Improved Champion" (Type B. N.), and the "Improved Royal" (type B. N. W.) The said horns referred to being commonly known as "Flower" [35] horns, and consisting of metal strips joined together at their edges by a seam so as to provide ribs on the outside of the horn, and being tapered from the inner to the outer end and made in a bell shape.

Upon the hearing of the motion plaintiff will use, read and rely upon the affidavits of W. H. Locke, Jr., Baldwin Vale, and John H. Miller, hereunto annexed, together with the papers and pleadings now on file in the case, a copy of patent number 771,441, the phonograph horns referred to in the said affidavit of W. H. Locke, Jr., the phonograph horns referred to in the affidavit of Baldwin Vale, two catalogues of the defendant company, the papers and pleadings on file in the case of Searchlight Horn Company vs. Sherman, Clay & Company, No. 15,326, in this court; the papers and pleadings on file in the case of Sherman, Clay & Company, vs. Pacific Phonograph Company No. 18, in this case; the papers and pleadings on file in the case of Searchlight Horn Company vs. Sherman, Clay & Company, No. 15,623, in this court, together with such other and further papers, evidence and data as may be produced at the hearing.

The ground for the above motion is that claims two and three of said patent No. 771,441, have heretofore been sustained and held valid in the aforesaid action at law of Searchlight Horn Company vs. Sherman, Clay & Company, No. 15,326, and that the judgment

in said suit has been affirmed by the Circuit Court of Appeals for the Ninth Circuit, and that in the other two cases referred to, preliminary injunctions have been granted by this court, and orders granting the same have been affirmed by the said Circuit Court of Appeals, and that the issuance of a preliminary injunction herein is necessary and proper under the rules of practice of this court; and that unless the same is granted, plaintiff will suffer great and irreparable loss and [36] injury, for which there is no plain, speedy, or adequate remedy at law.

JOHN H. MILLER,

WM. K. WHITE,

Attorneys for Plaintiff, Crocker Building, San Francisco, Cal. [37]

(Title of Court and Cause.)

Affidavit of William H. Locke, Jr., on Motion for Preliminary Injunction.

State of Pennsylvania,

County of Alleghany,—ss.

William H. Locke, Jr., being first duly sworn, deposes and says:

I am president of the Searchlight Horn Company, plaintiff in the above-entitled suit. Said company is the owner and holder of the Nielsen Patent, No. 771,441, involved in said suit and for infringement of which said suit was brought.

I became interested in the business of phonographic horns on or about January, 1904, and ever since then have been connected either directly or in-

directly with said business and am familiar with the same and also with the state of the art as it existed at that time and as it has since been developed.

Up to the year 1907, horns were not made a part of the equipment of the phonograph companies, but were manufactured by other parties and supplied by them to the jobbers of phonographs. In other words, the phonograph companies made and sold to the jobbers the phonographs themselves and the horn manufacturers made the horns for such phonographs and sold said horns to said jobbers after which the jobbers sold both the horns and phonographs to the dealers, who in turn sold them to the users. This state of the business continued up to some time in or about the year 1907. Prior thereto the Searchlight Horn Company was a manufacturer of phonograph horns containing the Nielsen invention and made and sold said horns to jobbers in the manner above stated. Said company had invested a large sum of money in said business and had [38] built up quite an extensive business throughout the United States selling its horns for use on phonographs of the National Phonograph Company, the Victor Talking Machine Company, the Columbia Phonograph Company, General, as well as others. There was a large call for horns at that time, and the business of manufacturing and selling horns gave promise of being profitable, and the Searchlight Horn Company invested about thirty-five thousand dollars in the same. But sometime in the year 1907, or thereabouts, the various phonograph companies throughout the United States concluded to make and did make the horns a part of

their equipment, and from that time on sold and do now sell the horns with the phonographs, thereby making it unprofitable for individual horn manufacturers to continue in the business as theretofore. In this way the sale of horns became a monopoly with the phonograph companies, and the Searchlight Horn Company could no longer continue its business of manufacturing and selling horns with profit for the reason that the jobbers were compelled to get the horns, together with the phonographs, from the phonograph companies. This forced the Searchlight Company to discontinue the actual manufacture of its horns in May, 1908, and since said time the Searchlight Horn Company has not been able to make or sell any of its horns though retaining the ownership of its patents, the reason being that the phonograph companies absorbed the business of manufacturing and selling horns. The horns made and sold by the phonograph companies thereafter were largely horns containing the invention of the Nielsen patent and were and still are known to the trade as "Flower" horns, the name originally adopted and applied by the patentee Nielsen to his patented horns.

When the Searchlight Horn Company discontinued its business in May, 1908, it endeavored through a long course of negotiations with the various phonograph companies, including the defendant [39] herein, to make arrangements for the payment to the Searchlight Horn Company of a royalty for the use of the Nielsen invention, and failing in that, for a purchase of the Nielsen Patent, having already notified the said phonograph companies that the

“Flower” horns which they were making and selling were infringements of the Nielsen Patent. The Searchlight Horn Company subsequently endeavored to sell and offered for sale the Nielsen patent to the Columbia Phonograph Company, General. These negotiations were carried on for a long period of time, but without success, and the Columbia Phonograph Company, General, finally at the conclusion of said negotiations, in the latter part of 1909, declined to make any arrangement for the purchase of the said patent or payment of royalty.

The Searchlight Horn Company then realized that it would be necessary to begin legal proceedings against the infringers of the Nielsen Patent, and, as president of the Searchlight Horn Company, I interviewed a number of lawyers and endeavored to secure the services of a competent one for the purpose of instituting and prosecuting infringement suits on the Nielsen Patent, but by reason of the fact that the Searchlight Horn Company had failed to meet its obligations and was in financial distress, I was not able for a long time to secure a competent attorney who would be willing to undertake the litigation until in April, 1910, when Mr. John H. Miller, an attorney of San Francisco, was introduced to me by a mutual friend. He stated that he would make an investigation and if after such investigation he was of the opinion that the Searchlight Horn Company had a good case he would undertake the same. He did make such investigation extending over a considerable period of time during which he witnessed actual demonstrations and experiments of various styles of

horns in New York and when he returned to San Francisco he commenced [40] a suit on behalf of the Searchlight Horn Company in May, 1911, against Sherman, Clay & Company, the Pacific Coast distributors of the Victor Talking Machine Co. That suit was in the nature of a test suit for the purpose of ascertaining whether said Nielsen Patent was valid and had been infringed, and other litigation was allowed to await the determination of that case. The Sherman, Clay and Company case was tried in open court in San Francisco in October, 1912, and resulted in a judgment in favor of the Searchlight Horn Company, sustaining the validity of the Nielsen Patent and awarding damages for its infringement. I was present at the trial of the said case and testified on behalf of the Searchlight Horn Company; after the entry of the said judgment, a motion was made for a new trial in that case, and also the Searchlight Horn Company commenced a suit in equity against Sherman, Clay and Company and asked for a preliminary injunction. I am informed and the said motion for a new trial has been denied, and the motion for preliminary injunction has been granted and an appeal taken.

I am informed that the defendant company is daily supplying and selling to others on the Pacific Coast the "Flower" horns in connection with the Columbia phonographs and in carrying on an active business therein, and that said horns are of the same construction and mode of operation as the flower horns which in the Sherman, Clay & Company case were held to be infringements of the Nielsen Patent. I know of my

own knowledge that the defendant is now extensively selling at New York phonograph horns containing the invention of the Nielsen Patent and being of the same construction as the horns involved in the suit against Sherman, Clay & Company, Pacific Phonograph Co. and Babson Brothers and therein adjudged to be infringements on claims 2 and 3 of said Nielsen Patent. On October 4, 1913, I visited the storeroom of the defendant [41] on 23d Street in New York City, and purchased from them one of such horns, and the same will be produced at the hearing of the motion for a preliminary injunction. I have marked on the same these words: "Horn purchased by W. H. Locke, Jr., on October 4, 1913, from Columbia Graphophone Co., 35-37 West 23d Street, New York City." On the same day I purchased another horn of the same construction, but of different color, from the defendant at its store on 125th Street, New York City. At that time defendant had on hand other horns of the same construction which it was offering for sale in connection with its phonographs or some of them.

If the defendant is allowed to continue this course of action pending the suit, the Searchlight Horn Company will be subjected to great and irreparable injury for which in my opinion there is no plain, speedy or adequate remedy at law, and in my judgment a preliminary injunction is the only adequate protection which the Searchlight Horn Company can obtain. I am led to believe and am so informed by my attorney that this litigation is liable to be long continued and expensive, and that in the ordinary

course of affairs attending the trial of equity cases it is uncertain when the case can be brought on for final hearing and that it will probably be necessary for both sides to take depositions at various places in the United States outside of the Pacific Coast, and even if a decree is rendered in favor of plaintiff, defendant will be entitled to take an appeal therefrom, and by giving a bond probably would further postpone until an indefinite time the final determination of the suit, whereas if a preliminary injunction is granted at this time the defendant will either be compelled to cease its infringement and leave the market to be supplied by the plaintiff or else will be compelled to obtain its horns from the plaintiff or someone authorized by the plaintiff to manufacture under the Nielsen Patent. The plaintiff is and would be willing to cause to be supplied to the defendant horns made under the [42] Nielsen Patent at a reasonable price or would allow defendant to make and sell such horns for a small royalty whereby defendant would be enabled to continue its business without serious hindrance or damage.

Furthermore, there has not been at any time any fixed or established royalty for the manufacture or sale of the horns covered by the Nielsen Patent, and it is probable that on an accounting plaintiff would not be able to prove its damages by such evidence as would be sufficient to clearly establish the same and would probably be compelled to rely upon a recovery of the defendant's profits which would involve a long, difficult and intricate proceeding. Under all these circumstances, I think that a preliminary injunction

is the only effectual remedy open to the Searchlight Horn Company whereby its rights can be protected. The validity of its patent has already been sustained by a verdict of a jury in this court and a motion for a new trial has been denied by the Court. Furthermore, I am informed that a preliminary injunction has been granted by this Court against Sherman, Clay & Company, distributors of the horns of the Victor Talking Machine Company and against Pacific Phonograph Co., distributors of Edison horns on the Pacific Coast, and under all these circumstances I submit that the Searchlight Horn Company is equitably entitled to a preliminary injunction against Columbia Graphophone Company, and other parties who are infringing upon this patent on the Pacific Coast.

The reason why suit has not heretofore been brought against the defendant and motion for an injunction made was because of lack of financial means on the part of the plaintiff and its inability to secure the services of a proper and competent attorney until the spring of 1910, but the Searchlight Horn Company has at all times asserted its rights under the Nielsen Patent and its intention to prosecute infringers, and has taken [43] all means in its power to give publicity thereto, and all manufacturers and dealers in talking machines including the defendant herein have at all times been aware of the plaintiff's position in the matter. In the year 1906 plaintiff notified the Victor Talking Machine Co. of Camden, N. J., the Tea Tray Company of Newark, N. J., National Phonograph Company of Orange, N. J., Haw-

thorne & Shebly Mfg. Co., and the defendant herein, who was then known as the Columbia Phonograph Company, General, that they were infringing upon said letters patent and requested that they discontinue the same. In order to make assurance doubly sure and for fear that some persons affected might not have been notified of the rights of the plaintiff, said plaintiff, in November, 1906, caused to be printed a circular notice of which a copy is hereunto annexed and marked exhibit "A" and mailed said circulars and notice generally to all persons whom they knew of who were engaged in the business of making and selling phonographs and phonographic supplies throughout the United States, amongst other persons to whom said circulars were sent was the Hawthorne & Shebly Manufacturing Company and the defendant herein.

WILLIAM H. LOCKE, Jr.

Subscribed and sworn to before me this 19th day of December, 1913.

[Seal]

WILLIAM R. JOHNSTON,

Notary Public.

My Commission expires March 10, 1917.

No. 1510.

Allegheny County,
State of Pennsylvania,—ss.

I, Wm. B. Kirker, Prothonotary of the Court of Common Pleas No. 1, in and for the county of Allegheny, in the Commonwealth of Pennsylvania, the same being a court of law and record and having a seal, do hereby certify that William R. Johnston,

Esquire, before whom the foregoing affidavit was taken, and who has [44] thereunto, in his own proper handwriting, subscribed his name, to the certificate of the proof or acknowledgment of the annexed instrument, was at that time and is now a notary public in and for the Commonwealth of Pennsylvania, resident of said county aforesaid, duly commissioned and sworn and authorized by law to take and certify affidavits and the acknowledgments and proof of deeds of land, etc., to be recorded, to all whose acts as such due faith and credit are, and of right ought to be, given throughout the United States and elsewhere; and further, that said instrument is executed in accordance with the laws of this Commonwealth, and that I am acquainted with his signature, and believe the same to be genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, in said county, this 19 day of Dec., in the year of our Lord one thousand nine hundred and thirteen.

[Seal]

WM. B. KIRKER,
Prothonotary. [45]

**Exhibit "A" [to Affidavit of Wm. H. Locke, Jr., on
Motion for Preliminary Injunction].**

**SEARCHLIGHT HORN COMPANY,
MANUFACTURERS OF
THE MARVELOUS SEARCHLIGHT
HORNS.**

Telephone 2606 Bushwick.

753-755 Lexington Avenue,

Brooklyn, N. Y., November 15th, 1906.

Dear Sirs:—

Becoming alarmed at the rapidity with which our "Searchlight Horns" have gained the favor of the public, our competitors have in an unbusiness-like manner attempted to intimidate our customers.

We therefore notify you that the Searchlight horn is protected by United States Letters Patent No. 771,441, of October 4, 1904, and No. 12,442 of Jan. 30, 1906.

Among other claims, said patents contain the following: A phonograph horn or the like comprising a number of flexed strips having curved meeting edges and means joining said edges, said strips being so flexed and said edges so curved and joined that the horn is given a trumpet-like or bell-like form, the strips forming angles where said edges meet.

A horn for phonographs and similar instruments, said horn being large at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally arranged strips secured together at their edges and the outer side thereof at the

points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.

All of the so-called "Flower Horns" made by our aforesaid competitors are flagrant infringements of said patents.

The "Searchlight Horn" is further protected by United States patent No. 38,275, of October 9th, 1906; and other patents covering said horn will issue in due course.

If after the knowledge of these facts you consider it prudent to buy "Flower Horns" other than the "Searchlight" do not hold us blameworthy if trouble ensues, as we have been obliged to place the patents in the hands of our attorney with instructions to take steps to protect our rights thereunder; and remember, please, that we make the best horn in the market and sell it at a fair price.

Very truly yours,

SEARCHLIGHT HORN COMPANY. [46]

(Title of Court and Cause.)

**Affidavit of Baldwin Vale on Behalf of Plaintiff and
Motion for Preliminary Injunction.**

State of California,

City and County of San Francisco,—ss.

Baldwin Vale, being duly sworn, deposes and says, I am a solicitor of patents and a mechanical expert in patent cases and testified on behalf of the plaintiff in the case of Searchlight Horn Company vs. Sherman, Clay & Company, heretofore tried in this court.

Some months ago under employment from plaintiff's attorney, I visited the offices and salesroom of the Columbia Graphophone Company, defendant herein, situated at 334 Sutter Street in the city and county of San Francisco, and inquired for and endeavored to purchase a Columbia phonograph of the type designated by that company as the "Bijou" and sometimes as the type "B. Z." I was informed by defendant's agent that their stock of horn machines was depleted and that they did not at that time have the "Bijou" machine in stock, but suggested that I might obtain one from the firm of Unti & Perrasso, of 342 Columbus Avenue, San Francisco. Defendant's agent gave me one of their catalogues at the time stated entitled "Columbia Disc Graphophone and Grafonola" which I herewith file in court as a part of my affidavit. On pages 8 and 9 thereof will be seen an illustration and description of the aforesaid "Bijou" machine, and in said description I found the following relating to the horn:

"The Floral Horn is 18- $\frac{3}{4}$ inches long and 16 inches across the bell—finished in red shaded enamel with gold markings, etc." [47]

Thereupon I visited the store of Unti & Perrasso at 342 Columbus Avenue, and there saw on exhibition a "Bijou" machine of the type referred to marked as a product of the Columbia Graphophone Company. I did not at that time purchase the same, but afterwards on June 19, 1914, in company with the plaintiff's attorney, Mr. John H. Miller, I visited the store of Unti & Perrasso at 342 Columbus Avenue, San Francisco, and there saw on exhibition and exposed

for sale several types and makes of phonographs provided with horns. One of these was a "Bijou" machine provided with a flower horn 18 $\frac{3}{4}$ inches long and 16 inches across the bell finished in red shaded enamel with gold markings and made of longitudinal strips of metal joined together at their edges by seams constituting ribs. Plaintiff's attorney thereupon purchased the said "Bijou" machine for the price of \$17.50 and I detached the horn from the same, carried it to the office of plaintiff's attorney, and scratched upon the same the following:

"June 19, 1914, Baldwin Vale"

at the same time instructing Unti & Perrasso to deliver the remaining parts of the graphophone at the office of plaintiff's attorney. At the time of purchasing said machine Unti & Perrasso stated that the machine was a product of the Columbia Graphophone Company from whom they had recently purchased the machine and that they were agents for the sale of the Columbia Graphophone of which this particular machine was a sample.

I herewith produce and file with the clerk the aforesaid horn which I identify as the one which was purchased from Unti & Perrasso at the time and under the circumstances above stated. The said horn bears all the mechanical characteristics of the horns which were adjudged to infringe plaintiff's patent in the case of Sherman, Clay & Company, wherein I testified as an expert witness for the plaintiff. [48]

In addition to the foregoing I desire to add the following:

On July 6, 1914, at the request of plaintiff's attorney, I visited the office and salesroom of the defendant at 334 Sutter Street, San Francisco, for the purpose of ascertaining if the Company was still engaged in selling the infringing horns.

The defendant's representative in charge who waited on me, stated that at that particular time their stock of "Bijou" or "B. Z." type of graphophones had been depleted by being sold out, but he did not deny that that particular style of machine had theretofore been sold by the defendant at San Francisco, nor that it would not hereafter be sold, and suggested that I might get one from Unti & Perrasso, saying that that type of machine was sold only to Italians and Portuguese, and that Unti & Perrasso were the principal customers of defendant for said machines, but, at the same time, he showed me another type of graphophone called the "Improved Champion" known as the type "B. N." which said machine the company was engaged in selling at San Francisco, and which sold best to the Chinese, because it gave a louder tone than was possible with the other types, and the Chinese preferred such loud tones.

I was taken into the stockroom to see the "Improved Champion" and I there saw many of them in stock. While there my attention was also called to a "Bijou" or type "B. Z." horn for identification which I there saw. I also saw a large number of other horns of various and sundry descriptions, nearly all of them being made of metal and containing the infringing characteristics of the Nielsen horn, and there were also some wooden horns in stock

which did not contain the aforesaid characteristics.

The said "Improved Champion" machine is represented on page 25 of the Columbia catalogue which I have examined and which I understand is to be filed with the papers in this case. The said "Improved Champion" machine contains a metal horn with gold stripes [49] along the ribs, and contains all of the infringing characteristics of the Nielsen horn, even in a more pronounced degree than the "Bijou" or type "B. Z." horn. I have examined carefully one of these "Improved Champion" horns and understand that the same is to be filed with the papers in this case, from which the Court can readily understand the construction.

BALDWIN VALE.

Subscribed and sworn to before me this 10th day of July, 1914.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San
Francisco, State of California. [50]

(Title of Court and Cause.)

**Affidavit of John H. Miller on Behalf of Plaintiff
on Motion for Preliminary Injunction.**

State of California,
City and County of San Francisco,—ss.

John H. Miller, being duly sworn, deposes and says, I am attorney for the plaintiff and the reason why motion for preliminary injunction in this case has not heretofore been made, would be apparent from the following facts:

When I was employed by the defendant I did not deem it advisable to begin a multiplicity of suits against a multiplicity of persons before the patent had been sustained and consequently on May 9th, 1911, I began a test case in this court against Sherman, Clay & Company. Judgment in that case was rendered on October 4, 1912. A petition for a new trial was denied on April 12, 1913.

On May 23d, 1913, a Writ of Error was sued out by defendant, and on May 4, 1914, judgment was affirmed by the Circuit Court of Appeals.

On June 8, 1914, a Mandate was filed in this court. In the meanwhile, on March 11, 1913, I had notified defendant herein, in writing, of its infringement, and of plaintiff's intention to bring suit unless settlement was made, stating that if I did not hear from them within a reasonable time, my instructions were to commence suit.

On March 19, 1913, in answer to my letter, Messrs. Mauro, Cameron, Lewis & Massie, Patent attorneys of New York City, wrote me stating that they were the attorneys for the defendant, and in that letter they denied the validity of the patent, [51] and suggested that they had in their possession certain evidence which would invalidate the patent.

In answer to this letter I wrote them under date of March 25, 1913, stating that if they would furnish me with the details of the anticipating evidence referred to, I would delay suit temporarily so as to investigate same, and if I found it to be as they stated, no suit would be brought against their client.

In answer to this letter they wrote me under date

of March 31, 1913, that they were collecting the data constituting the details of the evidence referred to above, and that as soon as it was collected they would transmit this material to me within a very short time.

I waited until June 12, 1913, nearly two and a half months, without hearing from them, and thereupon, on June 12, 1913, I wrote them reminding them of their promise, and requesting that they would hurry up the matter.

In answer to this letter they wrote me under date of June 17, 1913, that some of the evidence referred to by them, had been turned over to Mr. Louis Hicks, a patent attorney of New York City, to be used by him in opposition to a motion for a preliminary injunction which I had made in the suit against the Pacific Phonograph Company, in this court, and that the remainder of the evidence consisted of a horn then in their possession, which had been publicly used during the years 1898, 1899, 1900 and 1901, which they considered to be an anticipation.

In answer to this letter I wrote them under date of June 24, 1913, that I was familiar with the data which had been given to Mr. Hicks, and as to the anticipating horn claimed to be in their possession, that Mr. Hicks had produced in the court a photograph of it, in the case against the Phonograph Company, and that I did not consider said evidence sufficient to invalidate our patent; [52] and I further informed them in said letter, that the motion for preliminary injunction in the Pacific Phonograph case, had been granted, notwithstanding the aforesaid evidence, and that under the circumstances, nothing remained for

me to do in respect to the defendant herein, except to file suit, and that unless I heard from them within a reasonable time, I should pursue that course.

In answer to this letter they wrote me under date of June 30, 1913, as follows:

“We have yours of the 24th inst. and note that on the same date (June 24th) the Court in California granted preliminary injunction against Mr. Hicks’ clients, holding that the showing made was insufficient. Your letter reached us during the absence of Mr. Easton, President of our client, who has started abroad on a short business trip. We expect Mr. Easton to return about the middle or latter part of August.

Without in the least degree altering our opinion regarding the invalidity of the Nielsen Patent, it would seem that there are only two courses open to us, viz., either to make an amicable settlement with your client, or to prepare our papers with a view to taking a prompt appeal as soon as the preliminary injunction shall have been granted against us as a matter of course. During Mr. Easton’s absence, there is no one empowered to conclude negotiations in a matter of this sort; although (insisting, as before, upon the invalidity of your patent) we might be able to open negotiations in case your clients are willing to consider settlement out of court.”

In answer to this letter I wrote them under date of July 11, 1913:

“Replying to your favor of June 30th, I beg to say that I have sent a copy of same to Mr. W. H. Locke, Jr., President of the Searchlight Horn Co., whose address is #38 West Thirty-Second Street, New York. I have requested him to take up with you the matter of settlement. Mr. Locke has communicated with you on the subject and asked for an early appointment.”

Thereupon, as I am informed by Mr. Locke, negotiations for settlement were carried on at New York between Mr. Locke and the representatives of the defendant, and in further anticipation of the situation, I wrote defendant's attorneys under date of July 22, 1913, as follows: [53]

“As you have heretofore been advised, the matter of negotiations for settlement of this matter are now in the hands of our client, Mr. W. H. Locke, Jr., of 38 West 32 Street, New York City. It is probable that these negotiations may consume more time than we had anticipated, and in the meantime the statute of limitations is running daily against our claims. Under these circumstances I have concluded to file a bill against your client, the Columbia Graphophone Company in the United States District Court here, merely for the purpose of stopping the running of the statute of limitations. After the suit is filed, I will give you a stipulation extending your time to appear until after the termination of our negotiations, and if these negotiations eventuate in a successful result, then I will dismiss the suit without costs to you. If, on the

other hand, the negotiations fail of result, then I shall expect you to appear in the suit and make defense with the understanding, however, that I will grant you reasonable extensions of time, to enable you to answer or to take such other steps in the matter as you may be advised."

In pursuance of the foregoing letter, a bill in this case was filed on July 24, 1913.

Thereafter, I received from the aforesaid attorneys a letter dated July 28, 1913, in which they say:

"We assure you that we have no wish to be sued, especially out in California. But, if we have to be sued, we are glad to perceive that we will have a courteous and considerate adversary.

In your previous letter you advised us that Mr. Locke, of New York City, would take the matter up with us for discussion. During the temporary absence in Washington of the writer (Mr. Massie) Mr. Locke had an interview with the Vice-president and General Manager of the Columbia Company, Mr. George W. Lyle (the President, Mr. Easton not yet having returned from abroad). Mr. Lyle reports that Mr. Locke stated to him that he (Mr. Locke) was not in a position to state what terms would be satisfactory for the future proceedings; and referred Mr. Lyle to yourself.

We had assumed that Mr. Locke would be in position to negotiate with our representative, and that upon Mr. Easton's return he and Mr. Locke could conclude matters, if they desired to do so. Until we can learn what arrangements (if any)

can be secured for the future, we are of course not in position to negotiate concerning the past.

Will you, therefore, either communicate directly with us, or advise Mr. Locke to communicate with our Mr. Lyle, stating what terms can be secured for the continued operations of the Columbia Company (and also what basis of settlement can be made for past operations) ?”

And on the next day I received from said attorneys, a letter dated July 29, 1913, acknowledging receipt of an attested copy of subpoena [54] in the suit in which they used the following language :

“Pursuant to the offer in your letter to my firm of the 22nd inst., I am transmitting herewith an original and two carbons of a proposed stipulation. My idea in formulating the stipulation is that, upon receipt of notification from you that we must go ahead with the defense, it would require us several days to prepare the Answer or other pleading, and would require five or six days additional for it to reach San Francisco. Although the mere preparation of the Answer might not require more than one or two days, yet we might be engaged in other equally urgent matters, and might not be able to take the case up for a few days; and we might have to wait a few days in order to obtain the signature of the proper officer of the Columbia Co.

If the proposed stipulation meets your approval, will you please sign and file it and also

sign one of the enclosed carbons and return it to me?

Will you also please send me copy of the Bill of Complaint?"

The stipulation referred to in the foregoing letter, reads as follows:

"It appearing that negotiations are now pending between the above-entitled parties, looking to an amicable settlement of this controversy out of court, it is now stipulated by and between counsel for the above-named complainant and counsel for the above-named defendant Columbia Graphophone Company (appearing specially for the purpose of this stipulation) that the time for the said defendant to appear and file its Answer or other defense or to take such other steps herein as it may desire, is hereby extended until two weeks subsequent to the receipt by defendant's counsel, in New York City, of a notification from complainant's counsel to proceed in the defense."

This stipulation was signed by counsel for the respective parties and filed in court.

Thereafter, I personally went to New York for the purpose, among other things, of endeavoring to effect a settlement, and while there carried on negotiations with the defendant's attorney, Mr. C. A. L. Massie, and also with an officer of the defendant company, which negotiations continued up to October 6, 1913, at which time they were abandoned because of our inability to agree on terms, and thereupon I wrote

to defendant's attorneys under date of October 6, 1913, as follows: [55]

"In view of the failure to come to an agreement in the matter of the claim of the Searchlight Horn Company against Columbia Graphophone Company, for infringement of the Nielsen patent on horns for phonographs, you may consider this as a notice pursuant to our stipulation for you to prepare and file your answer in the suit. You have two weeks from today."

Thereafter, enclosed in a letter dated October 11, 1913, Mr. Massie sent me a copy of defendant's Answer, saying, among other things:

"As the testimony on behalf of my client the Columbia Graphophone Co. would be in large part a repetition of the testimony taken by Mr. Hicks on behalf of the Pacific Phonograph Co., and as the effect of much of that testimony is to be passed upon by the Court of Appeals on the hearings set for the 30th inst., and a few days later,—it seems to me that it would be an advantage to your clients and mine, and to the trial Court as well, that we should postpone the taking of any testimony in this present case until after the Court of Appeals shall have spoken."

The answer was filed on October 20, 1913.

Thereafter, in pursuance of the suggestion contained in Mr. Massie's letter relative to awaiting the decision of the Court of Appeals, the following stipulation was entered into in the case and signed by the respective attorneys on or about January 6, 1914 (if my memory serves me correctly), viz.:

WHEREAS, in the Circuit Court of Appeals of the United States, appeals are now pending in three suits brought by this same plaintiff against other parties for the alleged infringement of the same patent that is involved herein, which said appeals have been argued and submitted and are likely to be decided at the February, 1914, term of the said Court; and

WHEREAS, the decisions in said cases may have some influence in the matter of taking of testimony herein, and the parties have mutually agreed to extend the time allowed by law for taking depositions under the Revised Statutes until after decisions of said appeals;

NOW, THEREFORE, it is stipulated and agreed by and between the parties hereto as follows:

1. That the plaintiff shall have until and including February 28, 1914, in which to take depositions under Sections 863, 864 and 865 of the United States Revised Statutes.

2. That the defendant shall have to and including April 10, 1914, in which to take depositions under said sections. [56]

3. That plaintiff shall have until and including May 10, 1914, in which to take rebuttal depositions under said sections.

Provided that if the said Circuit Court of Appeals shall not have decided the said appeals, as anticipated, at said February, 1914, term of said Court, then and in that event each of the times hereinabove provided shall be respectively

and correspondingly extended thirty (30) days each; and if at the end of the thirty (30) days thus further allowed defendant, said decisions are not yet forthcoming, there shall be a further extension of the times of the respective parties of a like period and so on, and a reasonable time shall in any event be allowed by each party to take depositions after the rendering of said decisions.

It is understood and agreed that this stipulation refers to the taking of depositions for final hearing and is without prejudice to the right of the plaintiff to move for a preliminary injunction in said suit, and in case such motion is made this stipulation shall not be used by defendant against plaintiff in opposition to said action."

On April 9th, 1914, the stipulation was extended to May 10, 1914, for depositions by defendant, and to June 10, 1914, for rebuttal depositions by plaintiff.

On or about May 10, 1914, the stipulation was further extended to July 10 and August 10, 1914, respectively.

On June 24, 1914, the stipulation was extended to September 1st and October 1st, 1914, respectively.

All of these stipulations were made at the request of the defendant's attorney.

All of the various letters between myself and the defendant's attorneys heretofore referred to, are in my possession and will be produced for inspection, if desired by the Court or counsel.

The mandates from the Circuit Court of Appeals

in the test cases referred to, were filed in this court on or about June 8, 1914, and thereupon I immediately began making preparations for my motion for preliminary injunction.

Pressing other professional duties have prevented me from completing the same until now. [57]

A few days before commencing this suit I called at the place of business of the defendant, No. 334 Sutter Street, San Francisco, to discuss the matter of the proposed suit, with Mr. W. S. Gray, business manager of defendant at San Francisco; the clerk in charge informed me that Mr. Gray was absent from the city and would not return for quite awhile, and I then left not caring to discuss the matter with a subordinate clerk, but before leaving I saw in stock on the shelves a large number of sectional ribbed flower horns, bell-shaped and made of tin of substantially the same construction and mode of operation as the Victor flower horns, which were held to be an infringement in the case against Sherman, Clay & Company, in this court. In fact, without a close inspection they could not be distinguished from said Victor horns. They were on the shelves in the store-room and apparently ready for sale. A few days afterwards I called again, but Mr. Gray had not returned, and as I did not deem it prudent to delay suit any longer, I filed the bill in this case.

JOHN H. MILLER.

Subscribed and sworn to before me this 10th July, 1914.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of San
Francisco, State of California.

Copies of the within Notice of motion for injunction and affidavits in support thereof received this 13th day of July, A. D. 1914.

C. A. L. MASSIE,
CHAS. E. TOWNSEND,
For Defendant.

[Endorsed]: Filed Jul. 14, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [58]

At a stated term, to wit, the March term, A. D. 1915,
of the District Court of the United States of
America, in and for the Northern District of
California, Second Division, held at the court-
room in the city and county of San Francisco,
on Monday the 22d day of March, in the year
of our Lord, one thousand nine hundred and
fifteen. Present: the Honorable WILLIAM C.
VAN FLEET, District Judge.

EQUITY 30.

SEARCHLIGHT HORN CO.

vs.

COLUMBIA GRAPHOPHONE CO.

Order Granting Preliminary Injunction.

Plaintiff's motion for an order granting a preliminary injunction enjoining and restraining the defendant until the final hearing from infringing upon United States letters patent, No. 771,441, dated October 4, 1904, which said motion was filed in this court on the 13th day of July, 1913, having come on regularly to be heard this 22d day of March, 1915, John H. Miller, Esq., appearing as attorney for

plaintiff, and Chas. E. Townsend, Esq., appearing as attorney for defendant, and the matter having been heard and considered by the Court, and the Court now being fully advised in the premises, and it appearing to the Court that the plaintiff is entitled to a preliminary injunction in the terms hereinafter following for the reason that the said letters patent have heretofore been adjudged valid by this Court in another case, and that such adjudication has been affirmed by the Circuit Court of Appeals of the United States for the Ninth Circuit, but notwithstanding such adjudication defendant has continued and is now threatening and intending to continue to infringe upon said letters patent and particularly claims 2 and 3 thereof, whereby plaintiff will be subjected to great and irreparable injury for which it has no plain, speedy or adequate remedy at law; [59]

NOW, THEREFORE, it is ordered that the plaintiff's said motion for preliminary injunction be and the same is hereby granted, and that, upon the filing by plaintiff of a good and sufficient indemnity bond to be approved by the Court in the sum of Two Thousand Dollars, conditioned to pay to the defendant such costs and damages as may be incurred or suffered by defendant from or by reason of said injunction if the Court shall finally determine that the same was wrongfully issued, a writ of injunction be issued under the seal of the Court enjoining and restraining the defendant, its officers, agents, servants and employees and all others acting in privity with the defendant, until the final hearing of the case, from

making, using or selling or offering or advertising or threatening to make, use or sell within the Northern District of California or elsewhere any horn or horns for phonographs or similar machines, either attached to or connected with or separate and disconnected from any phonograph or other machine, containing or embodying the invention claimed in and by claims 2 and 3, or either of them, of said letters patent No. 771,441, dated October 4, A. D. 1904, which said two claims read as follows:

"2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected and whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.

"3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally arranged strips secured together at their edges and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described."

And also from infringing upon the said two claims or either of them in any manner whatever and from aiding or abetting [60] or contributing to any

such infringement, and particularly and specifically from making, using, or selling, or offering or advertising or threatening to make, use, or sell any horn or horns for phonographs or similar machines, such as those horns heretofore and now being sold, advertised, and offered for sale and dealt in by defendant in connection with, or as a part of or pertaining to, phonographs or graphophones sold and dealt in by defendant and styled, respectively, the "Bijou" (type B. Z.), the "Improved Champion" (type B. N.), and the "Improved Royal" (type B. N. W.), —the said horns referred to being called and known as "Flower Horns" and consisting of metal strips joined together at their longitudinal edges by seams so as to provide ribs on the outside of the horn and being tapered from the inner to the outer and gradually but with a more abrupt taper adjoining the outer end, whereby a flaring outlet is produced and the horn is made in a bell shape. [61]

(Title of Court and Cause.)

Writ of Injunction.

The President of the United States of America to
Columbia Graphophone Company, a Corpora-
tion, Created Under the Laws of West Virginia,
Its Officers, Agents, Servants, Employees, and
all Others Acting in Privity with the Defendant,
Greeting:

WHEREAS, the above-named plaintiff has heretofore filed in this court its bill of complaint alleging that on October 4, A. D. 1904, letters patent of the

United States, No. 771,441, for an improvement in horns for phonographs and similar machines, were issued to Peter C. Nielsen, and that said patent is now owned by plaintiff, and that you have heretofore infringed and threaten to continue to infringe upon claims 2 and 3 of said letters patent by selling and causing to be sold to others horns for phonographs and similar machines containing and embodying the inventions set forth and claimed in and by said claims 2 and 3 of said letters patent, contrary to the force and effect of the statutes of the United States in that case made and provided :

AND WHEREAS, the plaintiff has heretofore applied to this Court and made a motion in writing in due form asking for a preliminary injunction, enjoining and restraining you until the final hearing of this case from continuing the said infringement, which said motion was supported by the verified bill of complaint and certain affidavits and exhibits filed on behalf of plaintiff :

AND WHEREAS, said motion was heretofore, on March 22d, A. D. 1915, duly and regularly heard and considered by the Court [62] and an order made thereupon that said motion be granted and that a preliminary injunction be issued in accordance with said motion upon the filing by plaintiff of a good and sufficient indemnity bond to be approved by the Court in the sum of Two Thousand (\$2,000.00) Dollars conditioned to pay to defendant such costs and damages as may be incurred or suffered by defendant from or by reason of such injunction, not exceeding in the aggregate the sum of Two Thousand Dol-

lars, if the Court shall finally determine that the said injunction was wrongfully issued:

AND WHEREAS, the said bond has been filed and approved by the Court:

NOW, THEREFORE, we do strictly command and enjoin that you, the said Columbia Graphophone Company, a corporation created under the laws of the State of West Virginia, your officers, agents, servants, employees, and all others acting in privity with the defendant, do forthwith and until the final hearing of the case, cease, desist, and refrain from making or using or selling, or offering or advertising to make, use or sell, within the Northern District of California, or elsewhere, any horn or horns for phonographs or similar machines, either attached to or connected with, or separate and disconnected from any phonograph or similar machine, containing and embodying the invention described and claimed in and by 2 and 3 or either of them, of said United States letters patent, No. 771,441, dated October 4, A. D. 1904, which said two claims read as follows:

“2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outward-directed flanges whereby said strips are connected and whereby, the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.

“3. A horn for phonographs and similar in-

struments, said horn being larger at one end than the other and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured together at their edges and the outer side thereof at the points [63] where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.”

And also from infringing upon the said claims or either of them in any manner whatever, and from aiding or abetting or contributing to any such infringement, and particularly from making, using or selling, or offering or advertising or threatening to make, use, or sell, any horn or horns for phonographs or similar machines, such as those horns heretofore and now being sold, advertised, and offered for sale and dealt in by defendant in connection with or as a part of or pertaining to the phonographs or graphophones sold and dealt in by defendant and styled, respectively, the “Bijou” (type B.Z.), the “Improved Champion” (type B.N.), and the “Improved Royal” (type B.N.W.)—the said horns referred to being called and known as “Flower Horns,” and consisting of metal strips joined together at their longitudinal edges by seams so as to provide ribs on the outside of the horn and being tapered from the inner to the outer end gradually but with a more abrupt taper adjoining the outer end, whereby a flaring outlet is produced and the horn is made in a bell shape.

Which said commands and injunctions you and each of you are hereby respectively required to observe and obey until our said District Court shall

make further orders in the premises.

Hereof fail not under the penalty of the law thence ensuing.

WITNESS the Honorable WILLIAM C. VAN FLEET, Judge of the said District Court, this 24th day of March, A. D. 1915, and the One Hundred and Thirty-ninth Year of the Independence of the United States of America.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [64]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Writ of Injunction on the therein-named Columbia Graphophone Co., a corporation, by handing to and leaving a true and attested copy thereof with Walter S. Gray, Pacific Coast Manager of Columbia Graphophone Co. personally at San Francisco, in said District on the 24th day of March, A. D. 1915.

JAMES B. HOLOHAN,
U. S. Marshal.

By Otis R. Bohn,
Office Deputy.

[Endorsed]: Filed Mar. 24, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[65]

(Title of Court and Cause.)

Stipulation Regarding Admission of Evidence at the Trial.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit as follows:

1. That at the trial printed, uncertified copies of U. S. and foreign letters patent may be used in evidence with the same force and effect as the originals or as certified copies, and that the date of issuance appearing on the same respectively shall be deemed to be and taken as the actual date of issuance thereof, subject, however, to correction in case of error found.

2. That certified copies of assignments constituting plaintiff's chain of title, duly certified by a Commission of Patents of the United States, may be used in evidence with same force and effect as the originals subject to correction in case of error found.

3. That subject to any objection that may be made as to incompetency, irrelevancy, immateriality or other grounds of inadmissibility, either party may offer in evidence at the trial as part of its record in this case any or all depositions, exhibits, testimony or other evidence offered by either party in the Equity Suit No. 15,623, of this plaintiff against Sherman, Clay & Company, now pending in the District Court of the United States for the Northern District of California, Second Division, or in the Equity Suit, No. 18, of this plaintiff against the Pacific Phonograph Company now pending in the

same court, or in Equity Suit No. 394 of this plaintiff against the Victor Talking Machine Company now pending in the United States District Court for the District of New Jersey, and the same when so offered and received in evidence in this case shall constitute and be part and portion of the proofs, exhibits testimony and evidence of the party so offering the same herein, with the same force and effect as if the same had been originally [66] taken and offered in the case at bar.

4. That within six years prior to the commencement of this suit in the Northern District of California and elsewhere in the United States, defendant sold horns for phonographs or graphophones similar in all respects to the two horns referred to in the affidavit of W. H. Locke, Jr., on motion for preliminary injunction and stated in said affidavit to have been purchased by him on October 4, 1913, from Columbia Graphophone Company at New York City; and that within six years prior to the commencement of this suit defendant issued and circulated catalogues entitled "Columbia Graphophones" M-250 of which a copy is hereunto annexed, and showing at pages 11, 13, 15, 21, 35, 37, 39, and 41 cuts and illustrations of horns sold by defendant.

5. It is also stipulated and agreed that at all the times mentioned in the Bill of Complaint, the United States Horn Company and plaintiff were and are corporations created under the laws of the State of New York and that the defendant was and is a corporation created and existing under the laws of the State of West Virginia.

Dated this 10th day of June, 1915.

JOHN H. MILLER,
Solicitor for Plaintiff.

C. A. L. MASSIE,
C. A. L. MASSIE,
CHAS. E. TOWNSEND,
Solicitors for Defendant.

So ordered:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Jun. 16, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [67]

(Title of Court and Cause.)

(Reporter's Transcript.)

Tuesday, November 23, 1915.

Counsel Appearing:

For the Plaintiff: JOHN H. MILLER, Esq.

For the Defendant: CHARLES E. TOWN-
SEND, Esq.

Mr. MILLER.—In this case against the Columbia Graphophone Company, it is all covered by a stipulation that is on file as of June 10th, last, and it says first, that at the trial printed, uncertified copies of United States and foreign letters patent may be used in evidence and so forth; second, that certified copies of assignment constituting plaintiff's chain of title, duly certified by a commissioner of patents of the United States, may be used in evidence with the same force and effect as the originals, subject to correction in case of error found; third, that subject to

any objection that may be made as to incompetency, irrelevancy, immateriality or other grounds of admissibility, either party may offer in evidence at the trial as part of its record any or all depositions, exhibits, testimony or other evidence offered by either party in the equity suit No. 15,623 of this plaintiff against Sherman, Clay & Co. now pending in the United States District Court for the Northern District of California, Second Division, or an Equity Suit No. 18, of this plaintiff against the Pacific Phonograph Company now pending in the same court, or an Equity Suit No. 394 of this plaintiff against the Victor Talking Machine Company, now pending in the United States District Court for the District of New Jersey, [68] and the same when so offered and received in evidence in this case shall constitute and be part and portion of the proof, exhibits, testimony and evidence of the party so offering the same herein, with the same force and effect as if the same had been originally taken and offered in the case at bar.

Then it admits that within six years prior to the commencement of this suit—it is also stipulated that within six years prior to the commencement of this suit in the Northern District of California and elsewhere in the United States, defendant sold horns for phonographs or graphophones similar in all respects to the two horns referred to in the affidavit of W. H. Locke, Jr., on motion for preliminary injunction, and stated in said affidavit to have been purchased by him on October 4, 1913, from Columbia Graphophone Company at New York City; and that within

six years prior to the commencement of this suit defendant issued and circulated catalogs entitled "Columbia Graphophones," M-250, of which a copy is hereunto annexed and showing at pages 11, 13, 15, 21, 35, 37, 39 and 41 cuts and illustrations of horns sold by defendant.

I produce the two horns referred to in that paragraph as samples of the infringing horns. One is a red horn, and bears on it, "Horn purchased by W. H. Locke, Jr., on October 4, 1913, from Columbia Graphophone Company, 35-37 West Twenty-third Street, New York City." That is the one that was used on the motion for a preliminary injunction, and is referred to in this stipulation. I asked that that be marked "Plaintiff's Exhibit No. 1, Defendant's Red Horn."

The other one is of the same kind, but a little larger, and made of black with gold stripes; that has on it the words, "Horn purchased by W. H. Locke, Jr., on October 4, 1913, from Columbia Graphophone Company, 35-37 West Third Street, New York [69] City." I ask that that be marked "Plaintiff's Exhibit No. 2, Defendant's Black Horn."

I now offer in evidence all the testimony, depositions and exhibits that were offered in evidence by us in the case just tried, No. 18, constituting the *prima facie* case of the plaintiff, they being offered under the stipulation which I have read. In that way we complete the *prima facie* record of the plaintiff in the Columbia case.

Mr. TOWNSEND.—On behalf of the defendant, and in accordance with the stipulation of June 10,

1915, defendant offers in evidence all the depositions, exhibits and testimony or other evidence offered on behalf of the defendant in Equity Suit No. 15,623, the suit of this plaintiff against Sherman, Clay in this district, and of the defendant in Pacific Phonograph Company just heard, and also such further depositions, exhibits or testimony or other evidence that the defendant may offer in the New Jersey case, and as I stated this morning, the defendant is willing to abide by any decree that may be entered in the Pacific case.

Mr. MILLER.—We offer in evidence in rebuttal in the Columbia case the same record that was offered in evidence in the case just tried, No. 18.

(Thereupon the case was submitted.)

[Endorsed]: Filed Jan. 22, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

[Proceedings Had October 30, 1913, 10 A. M.]
SEARCHLIGHT HORN COMPANY,

vs.

**PACIFIC PHONOGRAPH COMPANY and BAB-
SON BRS., INC.**

COMPLAINANT'S PROOFS.

CHRISTIAN KRABBE..... 2-24

EDWIN A. MERRITT.....25-47

WILLIAM H. LOCKE.....48-62

ARTHUR P. PETIT.....63

[71]

*United States District Court, Northern District of
California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Complainant,

against

PACIFIC PHONOGRAPH COMPANY,

Defendant.

SEARCHLIGHT HORN COMPANY,

Complainant,

against

BABSON BROTHERS, INCORPORATED,

Defendant.

Proofs for complainant for final hearing taken pursuant to United States Statutes, the equity rules and the order of this Court, and pursuant to notice by complainant's counsel.

Office of Duncan & Duncan,

73 Nassau Street,

October 30, 10 A. M.

Present: JESSIE B. KAY, Notary Public.

FREDERICK S. DUNCAN, of Counsel for
Complainant.

Complainant's counsel offers in evidence two original stipulations, the first extending defendant's time to take depositions herein to and including the fourth day of October, 1913, and the second extending defendant's time to and including the eleventh day of October, 1913, and extending complainant's time thirty days after October 11, 1913. Complainant's counsel further states that in response to tele-

graphic request from defendant's counsel complainant's counsel [72] extended defendant's time to and including Monday, October 27th for the sole purpose of enabling defendant's counsel to recall the witness E. A. Hawthorne and complete his deposition upon the understanding that the time to complete complainant's proofs by deposition be extended thirty days and with the understanding that plaintiff's proofs would be taken in the East irrespective of the contemplated Western trip of defendant's counsel. Complainant's counsel spreads upon the record the following telegram sent by complainant's counsel to defendant's counsel on October 24th from Cleveland.

“Louis Hicks,
Woolworth Building,
New York City.

“Glad to extend time for Hawthorne deposition Monday provided plaintiff's time is extended thirty days with understanding that plaintiff's proofs will be taken in East irrespective of your trip. Miller urges completion within two weeks. Can't you get Petit or Massie to represent you during absence. Back Monday, possibly Saturday.”

On Monday, October 27th, defendant's counsel having received complainant's counsel's telegram produced and examined the witness E. A. Hawthorne. On Tuesday complainant's counsel served notice upon defendant's counsel of the taking of the deposition of complainant's witnesses Christian Krabbe, Edward A. Merritt and William H. Locke, Jr., and others commencing October 30, 1913.

Complainant's counsel offers in evidence the original notice served upon defendant's counsel which notice was returned the same day with the annotation appearing at the foot thereof signed by defendant's counsel declining to accept the notice in question. [73]

[Deposition of Christian Krabbe, for Complainant.]

CHRISTIAN KRABBE, being called as a witness for complainant and having first been duly sworn, deposes as follows in answer to questions by Mr. Duncan:

Q. 1. What is your name, age, residence and occupation?

A. My name is Christian Krabbe; my age is 44, and I live in Yaphank, Suffolk County, New York, and my business at present is farming and real estate.

Q. 2. Before you went into farming and real estate what was your business?

A. I was in the electrical business at 166-168 Broadway, Brooklyn, for about twenty-one years, and then I was at 292 Broadway, Brooklyn, for four years.

Q. 3. Did your business include the handling of electrical supplies of various sorts?

A. Yes, sir.

Q. 4. Did you at any time handle phonographs and phonograph supplies?

A. Yes, sir, for many years prior to 1900 and I believe that I was the first man or one of the first to sell an Edison phonograph in Brooklyn.

(Deposition of Christian Krabbe.)

Q. 5. What was the first phonograph that you handled in your business?

A. The first phonograph that I handled was an Edison Electric Machine. A man named William Vogel, one of the firm of Vogel and Son, large manufacturers of tinware in South 9th Street and Kent Avenue, Brooklyn, came to me and spoke to me about phonographs. Mr. Vogel had been a customer of mine for many years in electrical supplies. Knowing that I was selling electrical supplies sold by the Edison Manufacturing Company managed by a man named Gladstone in 23d Street, New York, he came to me and said that he had seen the Edison phonograph and wanted one and asked me why I couldn't get those phonographs and make some money on them. I said I [74] would and went over and got one and sold it to him.

Q. 6. What year was it that you purchased this first Edison machine?

A. I can't fix the year exactly, but it was in the early nineties.

Q. 7. How long did you continue selling the Edison phonograph?

A. Until the latter part of 1908 or 1909.

Q. 8. What other phonographs or talking-machines did you sell beside the Edison phonographs?

A. The Victor, Xonophone Columbia and Talkaphone.

Q. 9. How early did you commence selling these later machines and up to what date did you continue handling them?

(Deposition of Christian Krabbe.)

A. I commenced getting these other machines or some of them shortly after I got the first Edison machine or as soon as the different machines were put on the market and I continued handling these different machines up to the time I went out of the talking machine business some four or five years ago.

Q. 10. Did you know Peter C. Nielsen the patentee of letters patent No. 771,441, in suit?

A. I got acquainted with him, yes.

Q. 11. Did you ever acquire an interest in the patent in suit? A. Yes.

Q. 12. Did you acquire the interest in the patent in suit that you have just referred to by a document in writing? A. I did.

Q. 13. I show you certified copy of an assignment of letters patent 771,441, executed by Peter Christian Nielsen under date of February 2, 1905, and acknowledged by him under date of February 10, 1905, and recorded February 17, 1905, in Liber M-71 page 61 of the assignment records in the United States Patent Office and I ask you whether this is a [75] copy of the instrument by which you obtained your interest in the Nielsen Patent? A. It is.

Q. 14. Were you present when Mr. Nielsen signed the assignment of which this is a certified copy?

A. Yes.

Q. 15. Did you see him sign the original?

A. Yes, I did.

Q. 16. What became of the original after Mr. Nielsen signed it?

(Deposition of Christian Krabbe.)

A. He delivered it to me and I took it with me.

Q. 17. What did you do with it then?

A. I had it sent to Washington to be recorded and afterwards I got it back.

Q. 18. At the time that Mr. Nielsen signed the original document of which this is a certified copy did you pay to him the purchase price referred to in the assignment?

A. Yes, I paid him the money before he give me the paper.

Q. 19. What if you know, has become of the original assignment of which this is a certified copy?

A. Subsequently I executed certain assignments relating to this patent to Mr. Locke and to the United States Horn Company but I think I kept the original assignment from Nielsen to me. Mr. Locke has asked me to find this and I have several times gone through my papers but cannot find the original assignment. It is possible that this assignment may have been turned over to Mr. Locke, at any rate I cannot find it although I have made several searches.

Complainant's counsel offers in evidence the certified copy of the assignment from Nielsen to Krabbe and the same is marked "Complainant's Exhibit Certified Copy Nielsen-Krabbe Assignment." [76]

Q. 20. How long before the date of Mr. Nielsen's assignment to you had you become acquainted with Mr. Nielsen? A. In April, 1904.

Q. 21. State the circumstances connected with your meeting Mr. Nielsen in April, 1904?

(Deposition of Christian Krabbe.)

A. One evening in April I was standing in my store when Nielsen called and waited about until I was finished with my customers. He had a horn in a black bag. He then asked me if I would talk with him and said he would like to sell me some horns. He took the horn out of the bag and I looked it over. I asked him what he would sell his horns for and he said \$2.50 or \$3.50 I can't exactly remember what. I was not much interested because I thought the price was too high and told him that I was buying my horns black and gold for \$1.10 and a horn like the black and gold for \$1.55, the prices may differ a little according to the manufacturer according to how heavy the metal was in the horn.

Q. 22. Did you do any business with Mr. Nielsen at that time? A. No.

Q. 23. Did you subsequently get possession of the horn that he showed you in April, 1904?

A. Yes, later on early in 1905 I bought Mr. Nielsen's patent and at the same time I bought his entire stock of horns and tools and his good will and included among the horns was the sample horn that he always carried about to show his customers and this was the one that he had shown me when he called on me in April. He kept this horn in his room in the black bag and did not keep it in the factory with the other horns.

Q. 24. What became of the horn that Mr. Nielsen showed you in April, 1904 and that you subsequently got possession of when you bought him out in the early part of 1905? [77]

(Deposition of Christian Krabbe.)

A. I marked this horn for identification with my signature and gave it to Mr. John H. Miller of San Francisco. I was in San Francisco on the 1st day of October, 1912 as a witness in the action brought by the Searchlight Horn Company against Sherman, Clay & Company in the United States District Court, Northern District of California, Second Division, and I then produced the horn you are asking about and identified it and it was offered in evidence as Plaintiff's Exhibit No. 9. At the end of the trial I left the horn with the Court and I understand that it is still an exhibit in that case and is being used in connection with an appeal that was taken from the judgment that was rendered in favor of the plaintiff.

Complainant's counsel now offers in evidence the horn referred to by the witness in his last answers and which was produced by the witness as an exhibit in the action of the Searchlight Horn Company against Sherman, Clay & Company and which was marked Plaintiff's Exhibit 9 in said action and said horn is now marked "Complainant's Exhibit Nielsen Horn April, 1904."

Q. 25. Prior to your meeting Nielsen in April, 1904, had you heard of Nielsen or his horn?

A. Yes, sir. I had heard of him, had heard that there was a man, named Nielsen, over in Greenpoint making a new kind of horn that looked like a flower, called a flower horn. I heard that he had been showing it about in different jobbers' stores.

Q. 26. Referring now to the old Edison phonograph that you started handling in the early nineties

(Deposition of Christian Krabbe.)

please state what kind of a horn was supplied or used with that machine?

A. A small tin horn about eleven or twelve inches long and about five inches in diameter at the big end made out of [78] one piece of tin soldered or pressed together.

Q. 27. Please look at page 70 of "Complainant's Exhibit Manual of the Edison Phonograph" and point out any horn that corresponds with the horn that you say was supplied and used with the Edison phonograph when you first handled that machine?

A. A small conical horn made of tin, black enamel was what was used on this machine and such a horn is indicated near the middle of the cut on page 70 and I have marked it with the figure 1.

Q. 28. What kind of horns was used on the Victor and other machines that you handled during the early nineties?

A. Black enamel tin horns of larger size than the Edison horn I have just referred to. Also some brass horns of larger size. The horns were about 18 to 20 inches long and were conical in shape with straight sides. At the larger end of the cone a flaring bell was attached.

Q. 29. Describe generally the kinds of horns that were supplied by the talking machine companies or that were used by the public in connection with talking machines prior to the time when you first heard of the Nielsen horn?

A. There was always some small horns furnished with the machines similar to the ones I first men-

(Deposition of Christian Krabbe.)

tioned, as being supplied with the Edison phonograph. A few years later the Edison Company made a horn of the same size as the horn described but with a brass bell on it which made it fourteen inches, ten inches with a four-inch bell made about a fourteen-inch horn and Edison Company continued this as their standard equipment until the flower-horn was adopted by them after Nielsen had put such horns on the market. If the public wanted a larger horn or a horn of a different shape for use on the Edison machine they had to buy it from some jobber or dealer and there were a number of manufacturers [79] who made horns for the jobbers and dealers. These horns were sometimes made entirely of brass particularly at the beginning and later the popular horn that was sold almost universally was the horn called B. and G., a horn similar to the horn of the Edison Company only larger, some sizes as large as ranging from fourteen to fifty-six inches. The B. and G. horn was much cheaper to make and easier to keep clean and for this reason largely replaced the brass horn. The B. and G. horn had a conical body made of a single piece of metal, the edges of which were joined by a seam or by solder and the sides of which were straight. To the large end of the cone a polished spun brass bell was attached.

Q. 30. Please look at the Complainant's Exhibit Hawthorne & Sheble Advertisement of January 15, 1905, and compare the illustration at the right-hand side of that advertisement with the B. and G. horn

(Deposition of Christian Krabbe.)

that you have been describing?

A. I have done so and I find that the illustration at the right-hand side of the advertisement correctly shows the shape of the B. and G. horn before mentioned and shows the spun brass bell joined to the conical body. This particular horn of the Hawthorne & Sheble Mfg. Co. apparently is covered with their patented "silk finish" according to the statement of the advertisement but that company and a number of other manufacturers put the B. and G. horn on the market for many years without any exterior finish except paint or enamel. The form was similar to that shown in the advertisement.

Q. 31. Please continue your statement of the horns supplied by the talking machine companies or used by the public prior to the time when you first heard of the Nielsen horn?

A. There were some attempts made to use glass horns with the idea of making a seamless horn, people having the idea that a horn without a seam would give a better tone [80] than a horn with seams. The glass horns were used very little, however, because they were too expensive, broke too easily and did not seem to give any better results.

Paper horns were also offered for sale and were used to some extent for soprano voices and string music, but were sold in small quantity compared with the metal horns. The all brass horns that I have mentioned before were largely replaced by the B. and G. horn, but were continued in use for some purposes, in comparatively small quantities.

(Deposition of Christian Krabbe.)

The shape of the all brass horn was substantially the same as that of the B. and G. horn, only these were made entirely of brass.

A few horns were offered on the market made of silveroid to represent aluminum and others were offered that had the usual tin or sealed body with the aluminum bell. These horns were made by the Hawthorne & Sheble Mfg. Co. In form they were identical with the B. and G horn. The silveroid did not sell good because they turned black and people did not want them and the aluminum horns were too expensive.

Q. 32. You have now spoken of what the Edison Company did in regard to supplying horns with its machines. What did the Victor Company and the other talking machine companies do from the time you first handled their machines up to the time you heard of the Nielsen horn?

A. The Victor and other companies followed the same practice as the Edison Company and put out substantially the same horns, the sizes varying somewhat to fit the different machines. The horns supplied by these other companies were all small horns and were of the same construction as those I have described in connection with the Edison machines.

If the public wanted larger horns or horns of different [81] shape or material they had to buy horns made by independent manufacturers and sold through jobbers and dealers. This continued the practice of all the talking-machine companies up to

(Deposition of Christian Krabbe.)

the time when they adopted the Nielsen flower-horn and made it part of their standard equipment.

Q. 33. How was the horn that Nielsen showed you in April, 1904, constructed?

A. It was made up of a number of elongated strips extending from the small end to the big end of the horn and secured together at their edges by L-shaped flanges that were soldered together. The outside shape of the horn was curved like the outside of a morning-glory.

Q. 34. What was the shape of each of the strips that were joined together to form this horn that Nielsen showed you in April, 1904?

A. They were long strips narrow at one end and larger at the other end and the sides of the strips were curved. The sides of the strips were turned up to form flanges.

Q. 35. How did you come to purchase the Nielsen Patent and take over his horn business in February, 1905?

A. Not long after Nielsen showed me a horn in April, I passed by the shop of one of my competitors about a block and a half away from me, the man's name was Kanofsky and saw one of Nielsen's horns in the window. This horn was painted in imitation of a flower like a morning-glory. I began to wonder about the Nielsen horn and before long people began to come to my store and ask if I had got that new kind of Swedish horn. I told them I didn't have it, but they didn't seem to want any other kind or to buy a machine unless I had that

(Deposition of Christian Krabbe.)

horn. Not long after that I went over to New York to a wholesale place by the name of Blackman who was agent for the Edison and the Victor Companies to buy some supplies. [82] I saw his whole window filled up with morning-glory horns painted in different colors. I asked the clerk who made those horns and he said some Danish or Swedish man from Greenpoint came over there and wanted to give them the agency, but he did not come back but went and gave Bettini the agency. The clerk said that Blackman had then sent down to the Tea Tray Company, I think it was and got them to make the horns like his.

Q. 36. What kind of horns were those that you saw in Blackman's window?

A. Flower-horn exactly like the one that Nielsen had shown me.

Q. 37. What was the next place, if any, that you saw a flower-horn of this construction?

A. I think it was Bettini. He had the Nielson horn there.

Q. 38. Who was Bettini?

A. He was another wholesaler in New York City. I saw Nielsen's horns there. They told me that the horns were made in Greenpoint by a man named Nielsen.

Q. 39. Did they tell you anything about the horns being patented?

A. They showed me a little piece of yellowish paper pasted in the horns and it said on it "patent applied for."

Q. 40. What happened next so far as your con-

(Deposition of Christian Krabbe.)

nection with the Nielsen horn was concerned?

A. I got sorry that I hadn't paid attention to Nielsen at first. By-and-by I looked him up and went over to Greenpoint to see him about getting a few horns as I thought that I could buy them cheaper of him than anybody else. He was living on the second floor and was making the horns downstairs in an empty store with a living-room in [83] the back. He showed me a lot of horns in a drying room that was heated to bake the enamel by a lot of oil stoves. He commenced to talk Danish to me and we spoke together in Danish. He told me he had lots of trouble because other people were making his horns but now he got his patent and he was going to an attorney. He showed me his patent.

Q. 41. What nationality did Nielsen belong to?

A. Denmark.

Q. 42. Could he understand English well?

A. No; he had great difficulty in talking and understanding English.

Q. 43. How many horns did you see there at Nielsen's shop?

A. A good many. I couldn't say how many but the room was full of them.

Q. 44. Were there any horns being made up when you were there?

A. The workingmen had gone home, it was six o'clock. He had his wife, one man and two girls working for him. The girls did the painting. There were a lot of partially finished horns there that Nielsen showed me. He showed me his ma-

(Deposition of Christian Krabbe.)

chinery and how he made the horns.

Q. 45. How were the horns made that he showed you at the Greenpoint shop?

A. They were made the same as I have already described except that some of them had the flanges on the edges of the strips soldered together and some had the edges bent over into a seam. He had a machine which he had bought for the purpose of making this seam. He said that he made them with this seam because it was cheaper and because his patent allowed him to make them with a seam like this as well as with the flanges soldered together. [84]

Q. 46. During the year 1904, did you see the sale of flower-horns in any quantity by jobbers and dealers?

A. I saw the horns made by Nielsen sold in considerable quantity by Bettini and by some others, and I also saw horns of the same construction sold in very large quantities by a large number of other manufacturers and dealers, I bought horns from Nielsen and sold them myself.

Q. 47. What was the result of your dealings with Nielsen during 1904?

A. It resulted in me calling on him many times buying his patent and also his business under an agreement by which he was to work for me for one year and help and assist me in making and selling these horns and making a success of the business, and in defending his right under the patent.

Q. 48. As a matter of fact, did Mr. Nielsen remain in your employ for a year?

(Deposition of Christian Krabbe.)

A. Nielsen carried on the business for me for about a month at Greenpoint until the lease expired. Then I opened up a factory at 124 Broadway, Brooklyn, after we had established a company named the United States Horn Company. Nielsen remained with that concern for six ~~months~~ to nine months and then he claimed that his eyes got sore and wanted to take a rest. He finally left and went back to Denmark, promising to come back but never did.

Q. 49. Where is Mr. Nielsen now?

A. I do not know; the last I heard of him was in Denmark in 1906. I have tried to get in touch with him since then but have not been able to locate him and I do not know where he is.

Q. 50. What is this document that I now show you?

A. It is an assignment of half my interest in the Nielsen Patent to William Locke. This is my signature at the foot of the assignment which is dated February 14, 1905. [85]

Q. 51. Did you execute and deliver this assignment to William H. Locke, Jr., named as assignee therein? A. I did.

Complainant's counsel offers in evidence the original assignment in question which is marked "Complainant's Exhibit Krabbe-Locke assignment of February 14, 1905."

Q. 52. Did you at any time assign your remaining interest in the Nielsen patent to the United States Horn Company after you had made the assignment to Mr. Locke just offered in evidence?

(Deposition of Christian Krabbe.)

A. Yes, sir.

Q. 53. Please examine the certified copy that I now hand you of an assignment from Christian Krabbe to the United States Horn Company of "all my right, title and interest in and to said invention, said letters patent No. 771,441," dated February 24, 1905, acknowledged February 24, 1905, and recorded March 1, 1905, in Liber O-71, page 41 of Transfers of Patents in the Patent Office at Washington and state whether this is a correct copy of the assignment that you say that you made to the United States Horn Company?

A. Yes, sir, I executed an assignment of which this is a copy and delivered the same to the United States Horn Company at or about the date of the assignment in question.

Complainant's counsel offers in evidence the certified copy of the assignment just produced and the same is marked "Complainant's Exhibit certified Copy Assignment Krabbe-United States Horn-Company, February 24, 1905."

Q. 54. Did William H. Locke, Jr., to whom you assigned a half interest in the Nielsen patent assign that interest to the United States Horn Company?

A. Yes, sir.

Q. 55. I show you a document purporting to be an assignment from William H. Locke, Jr., to the United States Horn [86] Company dated February 24, 1905, and ask you whose signature that is at the bottom at the foot of this instrument?

A. That is William H. Locke, Jr.

(Deposition of Christian Krabbe.)

Q. 56. Do you know Mr. Locke's signature?

A. Yes, I have seen him make his signature many a time.

Q. 57. Were you connected with the United States Horn Company?

A. Yes, sir, I owned half of the stock and was treasurer of that company, Mr. Locke and myself formed that company and we both assigned to it our interests in the Nielsen patent at the same time. The assignment that you showed me signed by William H. Locke, Jr., was delivered by him to the company the same time as my assignment to the company.

Complainant's counsel offers in evidence the original assignment referred to by the witness and the same is marked "Complainant's Exhibit Locke-United States Horn Company assignment February 24, 1905."

Q. 58. What kind of horns did the United States Horn Company that you say was formed by you and Mr. Locke make?

A. They made the Nielsen horn that I have already described.

Q. 59. With what kind of seam connecting the different sections of the horn did the United States Horn Company make its Nielsen horn?

A. We may have made a few with the L-shaped butt seam soldered but practically all were made with the edges turned over and locked together without solder. These horns that we made were identical

(Deposition of Christian Krabbe.)

with the horns that I saw Nielsen making at Greenpoint.

Q. 60. Have you recently had in your possession any of the horns made by the United States Horn Company?

A. Yes, in the trial of the Sherman-Clay Co. action in [87] San Francisco in October, 1912, I produced two horns that were made by the United States Horn Company, one of them was a blue horn that was offered in evidence as Plaintiff's Exhibit 10 that had the stripe joined together by flange seams soldered. The other one was a red horn offered in evidence as Plaintiff's Exhibit 11 that had the strips joined together by the bent-over seams, without solder. Both of these horns were made by the United States Horn Company.

Complainant's counsel offers in evidence the two horns that were offered in evidence in the Sherman Clay Co. action and the same are marked "Complainant's Exhibit United States Horn Company's horns Nos. 1 and 2, respectively."

Q. 61. Are you acquainted with the Searchlight Horn Company, complainant in this suit?

A. I know that company and have had dealings with its officers. It succeeded to the business of the United States Horn Company and when the Searchlight Horn Co. was organized or shortly thereafter, I sold out my interest to Mr. Locke.

Q. 62. About when was it that the Searchlight Horn Company succeeded to the business of the United States Horn Company?

(Deposition of Christian Krabbe.)

A. I have here the original assignment from the United States Horn Company to the Searchlight Horn Company dated January 4, 1907.

Q. 63. Do you know who was president of the United States Horn Co. in 1906 and early in 1907?

A. Mr. Winter.

Q. 64. What is his full name?

A. Alexander K. Winter.

Q. 65. Do you know the signature of Mr. Winter?

A. I have seen him sign his name often. [88]

Q. 66. Who was secretary of the United States Horn Company during 1906 and early in 1907?

A. John C. De Graw.

Q. 67. Do you know his signature?

A. Yes, sir, I have seen him sign his name often.

Q. 68. Whose signatures are those attached to the document you recently referred to, dated January 4, 1907?

A. They are the signatures of Mr. Alexander K. Winter, who was president of the United States Horn Company, Mr. John C. De Graw, who was secretary of that company, Mr. William Locke, Jr., whose signature I know. I do not know the other signature.

Complainant's counsel offers in evidence the assignment in question and the same is marked "Complainant's Exhibit Assignment United States Horn Company-Searchlight Horn Company, January 4, 1907."

Q. 69. After the Nielsen horn was offered for sale by him and by the Bettini Phonograph Company,

(Deposition of Christian Krabbe.)

what effect did this horn have in the phonograph trade?

A. It practically did away with the B. and G. horn and with whatever all brass horns still remained in use. Those concerns that have been making the B. and G. and brass horns started making flower horns in imitation of the Nielsen horns. I have already referred to the flower horns that I saw at Blackman's place. In a short time flower horns were put out by nearly all of the manufacturers and not long afterwards the talking-machine companies themselves adopted the flower horns as part of their standard equipment and raised the price of their machines so as to include the horns. This practically put the independent horn manufacturers out of business except those that continued making the horns for the talking-machine companies. [89]

Q. 70. To what extent was the flower horn used after it was introduced by Nielsen in 1903?

A. Toward the latter part of 1904 and for a number of years succeeding it was practically the only metal horn used and was used in enormous quantities.

Q. 71. Under what name was Mr. Nielsen doing business when you visited him in Greenpoint?

A. Under the name of The Lilly Phonograph Horn.

Q. 72. Can you produce one of the billheads used by Mr. Nielsen in the latter part of 1904?

A. Yes, I now produce such a billhead dated December 22, 1904, which is pasted on page 9 of Nielsen's account-book which came into my possession in

(Deposition of Christian Krabbe.)

February, 1905, when I bought his business.

By complainant's counsel: This is the same bill-head that has already been offered as complainant's exhibit "Billhead of the Lily Phonograph Horn."

Q. 73. Were you acquainted with the operations of the Nova Phonograph Company?

A. I was acquainted with Mr. Senne and I know that that concern was engaged in making and selling flower horns the same as the Nielsen horn. They made these horns at first out of metal the same as Nielsen and we notified them that they were infringing the Nielsen patent and afterwards we brought suit against that company.

Q. 74. Who organized or operationed the Nova Phonograph Horn Company?

A. I understand that Mr. Senne and his father-in-law Mr. Petersen and a man named Andraesen who had formerly been employed by Mr. Nielsen selling Mr. Nielsen's horns.

Q. 75. Who is the A. Andraesen whose name appears at the top of page 1 of the account-book kept by Nielsen which you produced a short time ago? [90]

A. Andraesen was the salesman that I have already referred to. Mr. Nielsen told me that this entry at the top of page 1 covered horns that he had delivered to Andraesen to go out and sell. The translation of the entry of this page is "Horns delivered to A. Andraesen."

Q. 76. What is your nationality? A. Danish.

Q. 77. And do you speak the Danish language?

A. Yes.

(Deposition of Christian Krabbe.)

Q. 78. What is this book that you have produced?

A. It is an account-book of Nielsen which he gave me after I bought him out.

Q. 79. In whose handwriting are the entries in this book?

A. Most of them are in Nielsen's and a few of them in Mrs. Nielsen's.

Complainant's counsel offers in evidence the book in question and the same is marked "Nielsen's Account-book."

Q. 80. Do you know whether Mr. Nielsen had any earlier account-book covering the manufacture and sale of these horns prior to the first date in the book just offered in evidence?

A. I do not. He may have had other books or records. This book was only material to me because when I bought his business some of this money was still due from the Bettini Phonograph Company and I tried to collect it.

Q. 81. When you bought the business from Nielsen did you do anything toward notifying any of the companies that were manufacturing flower horns of your rights under the Nielsen patent?

A. I went from door to door to various of these companies, explained it to them and showed them the patent and my assignment. I saw the Douglas Phonograph Company and [91] notified them of my rights and they told me they wished me luck and that the invention no doubt belonged to Nielsen but I would have to prove it in the courts. I also notified the Teatray Company, talking personally with

(Deposition of Christian Krabbe.)

Mr. Conger, the superintendent. I also saw the Standard Metal Manufacturing Company and a number of other concerns. Among others I saw the Nova Phonograph Horn Company, and talked with Mr. Senne and notified him, after my representative had bought a horn from Mr. Senne.

After the United States Horn Company was formed that company notified the various infringing manufacturers and requested them to stop their infringement, but so many concerns were making the infringing horns that they all said that we would have to go to the courts before any particular one would stop making the horn.

Q. 82. What was your financial condition during the period when you owned the patent in suit?

A. I had no cash, my money was tied up in vacant property. For that reason I got Mr. William H. Locke, Jr., interested and we formed the United States Horn Company.

Q. 83. What was the financial condition of the United States Horn Company during the period it was the owner of the patent in suit?

A. Mr. Locke contributed some considerable sum of money which the company needed for the manufacture of its horns. We quickly used up all the money that we had in making horns and in trying to sell them. We found it impossible, however, to compete against the infringing sale of horns made in enormous quantity by the big horn manufacturers. When we notified these manufacturers to cease infringement they told us to go to court or put us off

(Deposition of Christian Krabbe.)

with one excuse or another. We found that the expense of litigation against these companies would be enormous and we were unable to get together the money that would enable [92] us to commence suit with any fair chance of carrying it through to a conclusion. The rapid growth of the infringing sales of horns practically drove us out of business and caused us to lose the money we had put in originally and we were, therefore, practically helpless in the matter of suing these infringers. A number of the concerns that we notified seemed greatly interested in our patent and some of them tried to get rights in it. Among these concerns was the Standard Metal Manufacturing Company who wrote Mr. Nielsen a letter dated March 8, 1905, which letter I now produce. The letter was dictated by W. A. L., which initials stand for W. A. Lawrence. In January, 1906, Mr. Lawrence wrote me another letter which I also produce.

Complainant's counsel offers in evidence the two letters produced by the witness and the same are marked "Complainant's Exhibits Standard Metal Mfg. Co. Letter March 8, 1905," and "W. A. Lawrence letter January 2, 1906."

Q. 84. When did you first hear the expression flower horn?

A. Toward the end of 1903 in connection with the horns offered by Nielsen. The horns made like Nielsen's were called Lilly horns and Morning-glory horns and a little later all of these horns were called flower horns. The term flower horn was not known

(Deposition of Christian Krabbe.)

in the trade until after Nielsen's horn was introduced.

Q. 85. Prior to your first acquaintance with the horn sold you by Mr. Nielsen had you ever seen or known of a horn having curved flaring sides made up of a number of strips of metal with longitudinal seams running from the big end of the horn to the narrow end, such strips being joined so as to form longitudinal ribs on the outside of the horn?

A. No, sir, the first horn like that was the horn that was shown me by Mr. Nielsen. [93]

Q. 86. Were you familiar with the horns made by the Hawthorne & Sheble Manufacturing Company prior to 1904?

A. Yes, I was familiar with those horns, having bought such horns and seen them often being sold by jobbers and dealers generally.

Q. 87. Did you ever see or hear of a horn made by Hawthorne & Sheble Mfg. Co. with steel, aluminum or other material prior to 1904 and having a number of longitudinal sections joined at their edges to form external ribs running from the large end of the bell to the small end of the horn? A. No, sir.

Q. 88. Were you familiar with Graphophone Grand Talking machine made by the Columbia Phonograph Company? A. Yes.

Q. 89. Can you produce a catalogue of the Columbia Phonograph Company?

A. Yes, sir, this has been among my old papers for years. It is a catalogue bearing date November 1, 1898.

(Deposition of Christian Krabbe.)

Complainant's counsel offers in evidence the catalogue in question and the same is marked Complainant's Exhibit Columbia Phonograph Catalogue November 1, 1898.

Q. 90. Can you produce any Hawthorne & Sheble catalogues?

A. Yes, I hand you three Hawthorne & Sheble catalogues issued by that concern at some early date which have been in my possession for many years. One of these catalogues entitled "Records for Graphophones and Phonographs" contains opposite page 16 a bulletin dated April, 1899. The second catalogue, entitled "How to make records," seems to correspond in period with the catalogue just above mentioned but does not seem to be dated. Both are printed in the same style with the same kind of covers. The third catalogue entitled "A Wonderful Invention" does not seem to be dated. [94]

Complainant's counsel offers in evidence the three catalogues referred to and the same are marked "Complainant's Exhibits Hawthorne & Sheble Catalogues 1, 2 and 3."

Q. 91. Are you familiar with any aluminum horns made by the Hawthorne & Sheble Mfg. Co. and if so what was the construction of such horns?

A. I am familiar with such aluminum horns made by the Hawthorne & Sheble Company. Their construction was identical with the B and G horn except that aluminum was used instead of the steel or tin body and the brass bell. The body was made of one piece with a single seam and the spun bell was at-

(Deposition of Christian Krabbe.)

tached to the large end of the conical body. This style of horn is illustrated and described on page 12 of the Hawthorne & Sheble catalogue No. 2 and on page 8 of the Hawthorne & Sheble catalogue No. 3 just offered in evidence. I know of no other aluminum horns made by the Hawthorne & Sheble Manufacturing Company. They made an imitation aluminum horn called silveroid that was made in the same way that I have just described. They also made a horn having the body made of tin or steel with an aluminum spun bell, the horn and bell being constructed and assembled in the same manner as the B. and G. horn. These are the only horns of aluminum made by the Hawthorne and Sheble Company to my knowledge.

CHRISTIAN KRABBE.

Sworn to before me this 30 day of October, 1913.
[95]

[**Deposition of Edwin A. Merritt, for Complainant.**]

New York, October 30, 1913.

EDWIN A. MERRITT, being called as a witness for complainants and having first been duly sworn, deposes as follows in answer to questions by Mr. Duncan:

Q. 1. State your name, age, residence and occupation.

A. Edwin A. Merritt; 40 years old; salesman for Diamond Match Company; 650 West 177th Street, New York.

Q. 2. Were you at one time connected with the sale of phonograph supplies, and if so when did you first

(Deposition of Edwin A. Merritt.)

become connected with that business?

A. About 1889 or 1890, I became connected with the New York Phonograph Company and I remained with this concern about a year and then went into another line of business. In 1898 I went to the Edison Phonograph Company again and remained with it until they closed up their New York office. This was about two years later. I then entered the employ of the Douglas Phonograph Company, having offices at 22nd Street, New York City, and later at 89 Chambers Street. I remained with this concern for about three years and left them to go with the Bettini Phonograph Company located at Chambers Street. I entered the employ of the Bettini Phonograph Company in the early part of 1904. I remained with this company for about a year until they disbanded; then I went back to the Douglas Phonograph Company and remained with them until they disbanded about three years ago.

Q. 3. During the time you were in the employ of these various concerns what was their general line of business?

A. The New York Phonograph Company handled electric talking machines only, which they rented. These machines were made at the Edison factory and we rented these machines out for use. My duties with this concern included the assembling of machines and testing.

The National Phonograph Company at 26th Street and [96] Broadway with whom I next went was engaged in the selling of talking machines and sup-

(Deposition of Edwin A. Merritt.)

plies for talking machines made by the Edison Company, then known as the National Phonograph Company. The supplies referred to consisted of records, horns and repair parts, and other general paraphernalia going with talking machines. While with this company I was one of their salesmen and later on had charge of their retail record department.

The Douglas Phonograph Company with which I next went were general jobbers in the talking machine business. They were the largest jobbers of talking machines and talking machine supplies in the country. They handled the Edison, Xonophone and Victor Machines and all of the usual run of supplies. They handled supplies for all talking machines then on the market and handled them in large quantities. While with the Douglas Company I was one of the chief salesmen of the Douglas Company and was regularly consulted in regard to the purchase of supplies, this being my specialty in that business.

The Bettini Phonograph Company was also a general jobber of talking machines of all makes and of supplies of all makes. I was one of the salesmen of the Bettini Company. When I returned to the Douglas Company later on I assumed my old position.

Q. 4. During your experience with the several companies that you have above referred to how familiar did you come to be with the use of phonographs and talking machines and with the problems connected with the reproduction of sound by such machines?

A. That came up almost daily. That was a constant subject there—what we could do to get a better

(Deposition of Edwin A. Merritt.)

and clearer reproduction of a record. We were constantly on the lookout for all improvements that were put upon the market, either in the machines themselves, in the records, or in the speakers, or horns. I was called upon both when I was [97] assembling machines and also when I was the salesman and assisting in purchasing of supplies to test various new devices that were offered from time to time and to pass upon the desirability of these devices. I was also constantly called upon to make practical tests of talking machines and supplies for customers. In purchasing the supplies for Douglas & Co. I was regularly consulted as to the desirability of various new devices that were proposed from time to time.

Q. 5. To what extent did you come in contact during your employment with these various companies with the horns sold or supplied for use in connection with talking machines?

A. Constantly from the beginning of my experience up to the time I last left Douglas & Company, about three years ago.

Q. 6. Did you know Peter C. Nielsen, the patentee of letters patent No. 771,441 here in suit?

A. Yes, sir.

Q. 7. Did you have anything to do with Mr. Nielsen in connection with the taking out of this patent?

A. Yes, sir.

Q. 8. State what you had to do with Mr. Nielsen in reference to the taking out of this patent.

A. I went with Mr. Nielsen to Edgar Tait & Co., the patent attorneys, and helped Mr. Nielsen explain

(Deposition of Edwin A. Merritt.)

to the attorney whom we met there what his invention was and helped the attorney prepare the application papers. I should state that Mr. Nielsen was a Dane and talked English very imperfectly and understood English very imperfectly. I went along with him at his request to see that Nielsen made himself understood to the attorney who was to take out the patent.

Q. 9. Please state when it was that you went to Edgar Tait & Co. with Mr. Nielsen for the purpose just recited.

A. As near as I could tell about the latter part [98] of March, 1904; at any rate it was a few weeks before the application was filed and I see from a copy of the patent that the application was filed April 14, 1904.

Q. 10. With whom were you employed at the time you went with Mr. Nielsen to assist him in applying for his patent? A. Bettini Phonograph Company.

Q. 11. How long had you been employed with that concern when you accompanied Mr. Nielsen to Edgar Tait & Co.? A. About two or three weeks.

Q. 12. Had you known Mr. Nielsen prior to your employment with the Bettini Phonograph Company?

A. I had met him once before.

Q. 13. When and where, and under what circumstances?

A. About November, 1903, he came into the Douglas Phonograph Company and tried to get them to adopt his horn or take up the selling of it.

Q. 14. Did you talk with him at that time?

A. Yes. He had a finished horn there that he

(Deposition of Edwin A. Merritt.)

called the Lily horn at that time. He exhibited this horn to Mr. Loucks, the manager, who called me to come and examine it. I looked over the horn and Mr. Nielsen explained to me its construction and its desirable features.

Q. 15. State what was the construction of the horn that Mr. Nielsen showed Mr. Loucks and yourself in November, 1903, or thereabouts, while you were employed with Douglas & Company.

A. The points were the shape of the horn which he claimed would give a round, fuller tone, clearer tone, and the ribs which he claimed would take away the vibration of the horn.

Q. 16. What was the shape of the horn that Mr. Nielsen exhibited to you at the time referred to?

A. A flower or lily shape, or morning-glory shape. He called it the lily, and his horn really represented [99] the lily—the morning-glory or lily horn, which was afterwards known as the flower horn to give it a general name. The horn tapered gradually from the small end toward the big end, flaring much more rapidly as it approached the big end, the sides of the horn thus having a curved, rapidly-flaring contour like the morning-glory.

Q. 17. You have referred to the ribs mentioned by Mr. Nielsen; please describe the construction of the horn and the ribs that you have mentioned.

A. The horn was made up of a number of sections, each of which extended from the small end of the horn to the big end. The edges of these sections were turned up into flanges and the flanges were soldered

(Deposition of Edwin A. Merritt.)

together and thus formed a rib between each pair of sections.

Q. 18. Did Mr. Nielsen explain to you at that time anything in regard to the effect upon the sound reproduction of these sections joined together by ribs?

A. He did. He said that the use of the sections and the ribs broke the vibration of the horn and the shape gave it a round and fuller tone.

Q. 19. What was the result of Mr. Nielsen's interview with you and Mr. Loucks at the Douglas Phonograph Company's office about November, 1903?

A. Mr. Loucks did not feel sufficiently interested in this new article to take it up and said that he did not care to try on a new thing and interfere with the large horn business that we were doing. I told him and Nielsen that I thought there was a good deal in what Nielsen said and urged our purchasing a number of the horns and trying them out, but Mr. Loucks' views prevailed and the Douglas Company did not buy any of the horns at that time.

Q. 20. When you went with the Bettini Phonograph Company in March, 1904, did you then come in contact with Mr. Nielsen or his horns in any manner, and if so, what? [100]

A. When I went with the Bettini Company in March, 1904, I found on hand there a number of samples of the Nielsen horns and found that Mr. Nielsen had some time previous brought these horns to Mr. Miller, the manager, and Mr. Miller was in negotiation with Mr. Nielsen concerning them. I was at

(Deposition of Edwin A. Merritt.)

once brought in touch with Mr. Nielsen in regard to these horns.

Q. 21. What was the result of your interview with Mr. Nielsen in March, 1904, relative to his horn?

A. We were all very much impressed with the value of the Nielsen horns which we tested thoroughly and found that they did all that Nielsen said they would do. We made an arrangement with Nielsen for handling his horns and from that time on for some time we handled the Nielsen horns, paying him a royalty. I took the samples that Nielsen had left with the Bettini Phonograph Company and went on the road at once to secure orders.

Q. 22. Where did you go to secure the orders?

A. Philadelphia.

Q. 23. Whom did you interview in Philadelphia in regard to these Nielsen horns?

A. The Penn. Phonograph Company; Litt Bros. and all dealers and jobbers in talking machines I called upon there. I showed the sample horns generally to the trade in Philadelphia.

Q. 24. What further resulted from your interview with Mr. Nielsen in March, 1904?

A. Mr. Miller advised Mr. Nielsen that he should protect his invention by a patent and as I have already explained I therefore went with him to Edgar Tait & Company, on Broadway, New York, some time in March, 1904, and assisted Nielsen in explaining his invention so that a patent application was drawn and filed by him about the middle of April.

Q. 25. At the time that Mr. Nielsen brought the

(Deposition of Edwin A. Merritt.)

sample horn to the Douglas Phonograph Company, or at the time [101] when he brought the sample horns to the Bettini Phonograph Company and you had your talks with him there, under what name was he carrying on the business of making and selling these horns?

A. Under the name of "The Lily Phonograph Horn."

Q. 26. I show you a document and ask you if you can state what is is?

A. This is a receipt given by the Bettini Phonograph Company to the Lily Phonograph Horn for 35 horns. The receipt is dated December 22, 1904, and is signed by A. E. Stryker. Mr. Stryker was employed by the Bettini Phonograph Company at the time I was connected with that concern and I recognize this signature as his. I do not, of course, know personally of the purchase of these particular 35 horns on December 22, 1904, by the Bettini Phonograph Company, but there were a large number of Nielsen horns bought after I joined the Bettini Phonograph Company in March. I have seen the other billheads used by Peter C. Nielsen under the name of "The Lily Phonograph Horn," which billheads contained the same printed matter as the one that you now show me.

By Mr. DUNCAN.—Complainant's counsel offers in evidence the receipt just shown the witness and referred to by him in the last answer and the same is marked "Complainant's Exhibit Nielsen Billhead, December, 1904."

(Deposition of Edwin A. Merritt.)

Q. 27. Referring now to the horn exhibited to you by Mr. Nielsen in the office of the Douglas Phonograph Company in November, 1903, please state of what material that horn was made.

A. I believe it was made of zinc.

Q. 28. What was the finish of that horn?

A. It was painted.

Q. 29. Was the horn incomplete in any way, or was it fully finished?

A. It was entirely finished in every detail. [102]

Q. 30. Referring now to the Nielsen horns, that you found on hand when you entered the employ of Bettini Phonograph Company, please state of what material they were made?

A. I believe they were made of zinc, but as they were painted I cannot be sure as before long the horns were made of tin and I am not sure just when the change from zinc to tin was made. We got the horns from Nielsen fully finished and painted so that the material of which they were made could not easily be recognized.

Q. 31. How did they correspond in construction and in shape with the sample horn that Mr. Nielsen showed you while you were with the Douglas Company?

A. Exactly the same, both in shape and construction and size.

Q. 32. Under what name did the Bettini Phonograph Company put these horns on the market?

A. The lily horn, but they soon became known to the trade by the general name of flower horn, and

(Deposition of Edwin A. Merritt.)

when others began to make these horns in imitation of ours the general name by which they were known was the flower horn, and have been known ever since by that name.

Q. 33. Prior to the introduction of the Nielsen horn by the Bettini Phonograph Company had you become familiar with the shapes and general construction of horns previously used for phonographs?

A. Yes, sir, I had come very intimately in touch with phonograph supplies generally and with horns. I have already pointed out that Douglas Phonograph Company was the largest purchaser and jobber of phonograph supplies of all sorts in this country, and we were constantly on the lookout for all improvements and every manufacturer who got up a new article would bring it to the Douglas Phonograph Company almost, if not the first.

Q. 34. State generally what horns were used for phonographs prior to the end of the year 1903 or thereabouts. [103]

A. They were the straight funnel-shaped brass or black and gold horns.

Q. 35. What was the outer contour of the straight brass horn that you have just referred to?

A. These horns had a conical-shaped body with a straight outer contour until they nearly reached the big end. Then a flaring bell was attached to the end of the horn in some way.

Q. 36. What was the shape of the black and gold horn that you have referred to?

A. It was practically the same. It is practically

(Deposition of Edwin A. Merritt.)

the same as the brass horn I have just described. The black and gold horn is correctly illustrated in "Defendant's Exhibit for Identification Talking Machine Hawthorne & Sheble Advertisement in Talking Machine World, page 4 of February 15, 1905," which I now have before me. The illustration of the black and gold horn is that found at the right of the advertisement.

Q. 37. What was the common name for the black and gold horn?

A. It was known in the trade as the B. and G. horn and was named B. and G. for short for black and gold. The body was usually painted or enameled black and the bell portion was spun brass highly polished.

Q. 38. What was the method of construction of the B. and G. horn?

A. The body was made up of one sheet of steel or tin plate that was bent into the form of a cone and the edges fastened together and the spun brass bell was then fastened to the large end of the cone.

Q. 39. According to your own experience was there any difficulty with the tone reproduction of the record through the brass horn or the B. and G. horn that you have just described?

A. With both of these horns, namely, the brass [104] horn and the B. and G. horn I frequently noticed what we called the "blast," namely, a sudden swelling or confusion of sound. This blast or sudden or undesirable increase of sound would become apparent under various circumstances, as, for

(Deposition of Edwin A. Merritt.)

example, in particular with certain qualities of voice or on certain notes or with certain classes of instruments. This was so pronounced at times as to make very disagreeable results. This was due in part to defects in the records or in the production of the records, and for a number of years improvements were made in the records that tended to eliminate these confusion sounds and blasts, but in spite of all that could be done toward improving the records this blast continued to a certain extent because, as we afterwards found out, of the construction of the horns that were then in use. The idea was that prevalent throughout the phonograph trade prior to the introduction of the Nielsen horn was that the blast or other confusion of sound could be eliminated by making the horn as seamless as possible. The belief was that the presence of seams caused a rattling or vibration that interfered with the purity of certain tones, particularly of certain quality of voices and of certain instruments, and that the greatest purity of tone could be attained by making the horn seamless, and for this reason the brass horns were made without seams. In the small brass horns the entire horn was spun out of a single piece of metal; in the larger horns where the bells had to be made separately from the cones the two parts were spun separately and braized together by a joint that was finished so as to be practically seamless.

In the B. and G. horn the horn was made with as few seams as the construction would allow. In spite of this elimination or attempted elimination of the

(Deposition of Edwin A. Merritt.)

seams we noticed the undesirable vibration that kept interfering with the purity of the tone reproduced from the records, and this difficulty was pronounced and interfered to a considerable extent [105] with the proper use of the records.

Q. 40. According to your own experience with the horns made by Mr. Nielsen, did such horns in any way effect the difficulty that you have already referred to in tone reproduction?

A. Yes, they did away with the difficulty I have referred to. Mr. Nielsen claimed to me when I first saw him in the fall of 1903 that by making up his horns in sections and joining them with ribs he could do away with the blast and undesirable vibrations that I have referred to, and my subsequent testing of these horns when I was with Bettini & Company and my subsequent use of these horns while with that company afterwards demonstrated the correctness of Mr. Nielsen's claims. I should add also that the correctness of his claims was shown by the universal adoption by the phonograph trade in 1904 of the sectional horn having the shape and construction of the Nielsen horn.

Q. 41. To what extent did the Nielsen horn go into use after it was brought to your attention by Mr. Nielsen in the fall of 1903.

A. As I have already stated in the early part of 1904 Bettini & Company made an arrangement to handle the horn and we handled the horn in large quantities. Almost immediately various horn manufacturers put upon the market a number of imita-

(Deposition of Edwin A. Merritt.)

tions of the Nielsen horn. These competing horns had the same shape as Nielsen's and were made up in the same manner of a number of flaring curved sections that were joined at their edges so as to form ribs. These horns were called the flower horns, following the designation given the horn by Mr. Nielsen himself. Some of the competitors called them morning-glory horns and some lily horns and *other* flower horns. By the latter part of 1904, or the early part of 1905, practically every horn manufacturer in the East, at any rate, was making this type of horn. They at [106] once superseded both the brass horn and the B. & G. horn as well as the paper horns that had previously been put upon the market in some quantity. At the time the Nielsen horn was introduced the phonograph machine companies were not supplying any large horn with their machines. The phonograph companies were supplying only a small conical reproducing horn, varying from 14 to 18 inches. There was a very widespread demand for larger horns running up as high as 48 inches, but these horns were not supplied by the phonograph machine companies. The public had to buy and did buy these horns in large quantities from jobbers and dealers who got them from concerns who made the horns specially. There was a very large business in the sale of these larger-sized horns after the Nielsen horn was introduced. Various manufacturers who had previously been making the larger-sized brass B. and G. horn above referred to took up the manufacture of flower horns. Among these concerns

(Deposition of Edwin A. Merritt.)

that put the flower horns upon the market in 1904 or early in 1905 were the Hawthorne & Sheble Mfg. Co. of Philadelphia, the Tea Tray Company of Newark, N. J., the Standard Metal Manufacturing Company of Newark, N. J., and several other concerns. The success of the flower horn was so marked, however, that within a short time the manufacturers of the phonographs themselves decided to give a larger horn with their equipment and themselves decided to adopt the flower horn. From that time on the flower became the regular standard equipment of the talking machine put out by the Edison, Victor, Xonophone and Columbia companies. The prices of the talking machines were raised by the manufacturers of such machines from \$2.50 to \$7.50 to cover the horn that was then supplied as part of the standard equipment. These talking-machine companies sold the machines and the horns under an agreement by which the jobbers and dealers were required to maintain certain resale prices in disposing of the machines. Under these agreements the jobbers and dealers could not buy the talking machines [107] without at the same time buying the flower horns as part of the standard equipment of those machines. The result was that most of the independent manufacturers of the flower horns were soon forced out of business and from that time on the flower-horn business was carried on by the talking-machine companies supplying the flower horns as part of the standard equipment as I have above pointed out.

Q. 42. Please compare the shape and construction

(Deposition of Edwin A. Merritt.)

of the flower horns that you say were introduced by the Hawthorne & Sheble Manufacturing Company, the Tea Tray Company, the Standard Metal Manufacturing Company and others in 1904 or 1905, and were later adopted and sold by the various talking machine companies as part of their equipment with the horn shown to you by Nielsen in the fall of 1903 and the Nielsen horns supplied to the Bettini Phonograph Company in the early part of 1904.

A. These flower horns as put upon the market by Hawthorne & Sheble, the Tea Tray Company and the other concerns mentioned in your question were of the same shape and were made in the same way as the Nielsen horn. The horns generally put upon the market were made of tin, which was also the case with the horns made by Nielsen for the Bettini Company except at the outset, and the ribs on the outside of the horns sold by the various manufacturers above referred to were usually made by folding the edges together into what is known as a tinsmith's seam, but this was the way in which Nielsen also made his horns for the Bettini Company except at the outset. The general shape and construction of the flower horn as put upon the market by the various manufacturers and talking-machine companies in 1904 and 1905 and succeeding years is shown in the exhibit I have already referred to, "Complainant's Exhibit for Identification Hawthorne & Sheble Advertisement, page 4, Talking Machine World, February 15, 1905." It is there illustrated as the silk-finish [108] horn which refers to the cloth covering that

(Deposition of Edwin A. Merritt.)

was placed upon the outside of the flower horn made by the Hawthorne & Sheble Manufacturing Company.

Q. 43. How did the trade and the public according to your experience and observation regard the flower horn as regards its tone and reproducing qualities?

A. They regarded it as superior in every way. It was found to give a rounder, fuller tone and eliminated a great deal of the metallic tone or vibration of the horn. Everybody agreed upon that. It was not only my opinion, but the customers, the small trade and the large dealers.

Q. 44. Can you produce any other advertisements of manufacturing companies supplying flower horns for talking machines?

A. I produce a photographic copy of page 30 of the Talking Machine World of December 15, 1907, containing an advertisement of the National Phonograph Co.'s new horn for the Edison Phonograph. This illustrates what I have already said in regard to the adoption of the new flower horn by talking-machine companies as part of their regular equipment. I also produce a photographic copy of the advertisement of the Federal Manufacturing Company of Cleveland, Ohio, advertising the Ideal horn, which advertisement appeared on page 14 of the Talking Machine World of May 15, 1908. I notice that this latter advertisement states, "Since the advent of the Phonograph, back in the eighties, it may safely be affirmed that no real progress has been made in the phonograph horn; its size has been grad-

(Deposition of Edwin A. Merritt.)

ually increased, thus merely accentuating the defects of the reproduction. At last, the "IDEAL" horn has come. A scientific device aiming at a pure, melodious reproduction of the sound, be it either a great soprano song, the endearment of a string instrument solo or the rendering of a Sousa march." This illustrates the statement that I have made in a recent answer to the effect that it was generally recognized that the [109] flower horn, because of its shape and construction gave a rounder and fuller tone, and eliminated those undesirable vibrations that caused the confused sounds and blasts particularly in connection with certain notes or certain quality of tones that cause a sympathetic response from the old metallic horn. It was found, as I have already said, that by dividing the horn up into sections that were fastened together by ribs and by giving it the flower shape these undesirable vibrations were eliminated.

I produce a photographic reproduction of page 10 of the Talking Machine World, containing an advertisement of the new Edison phonograph which corresponds with my statement made in a recent answer that the National Phonograph Company, maker of the Edison Phonograph, adopted the flower horn as a regular part of the equipment of its phonographs and made a price that included both the horn and the phonograph. This advertisement states that the "big appropriate properly proportioned horn has received such a welcome from the trade. The horn goes with the phonograph. The price includes both.

(Deposition of Edwin A. Merritt.)

There is a good profit in it. The new horn puts the phonograph at its best, satisfies every purchaser, makes a stock of horns unnecessary, and makes price cutting impossible."

Q. 45. About how long did the Bettini Company continue handling the horns made by Mr. Nielsen?

A. I think until the end of 1904 or the first month or two in 1905.

Q. 46. Why did the Bettini Company cease handling the Nielsen horn at or about the time you mention?

A. Because so many other companies had entered upon the manufacture of horns substantially identical with Nielsen's in such large quantity that they were offering them at prices lower than Nielsen's. The big companies that took up the manufacture of these horns were also able to turn [110] them out in larger quantities and with better finish than Mr. Nielsen. These, I believe, were the reasons why we felt compelled to buy our flower horns elsewhere pending Mr. Nielsen's establishment of his patent rights in the courts. I should also add that Mr. Andrew Andraesen, who was connected with Mr. Nielsen in the manufacture of the Nielsen horn under the name of Lily Phonograph Horn, got into some kind of a disagreement with Mr. Nielsen and started to make horns for himself; Mr. Andraesen joined with two men named Senne and Petersen, Mr. Senne being the son-in-law of Mr. Petersen and formed the Nova Phonograph Company, which started to make the Nielsen tin horns. It was difficult to do business

(Deposition of Edwin A. Merritt.)

with Mr. Nielsen because of his inability to understand or speak English well and his unfamiliarity with business methods in general. He was also without means and was unable to protect his patent right.

Q. 48. Prior to your connection with the Bettini Phonograph company in the early part of 1904 were you familiar with the horns made and sold by the Hawthorne & Sheble Mfg. Co. of Philadelphia.

A. I was. In the course of my duties I became thoroughly familiar with the Hawthorne & Sheble product in horns. Mr. Hawthorne was a regular visitor at the Douglas Company, seeking to sell horns or any other product that they manufactured.

Q. 49. Were you familiar with the B. and G. horn as put upon the market by the Hawthorne & Sheble Mfg. Company prior to March, 1904?

A. I was. That horn was the same as the regular B. & G. horn except that toward the end of 1903 some of these B. & G. horns made by the Hawthorne & Sheble Mfg. Company were covered with a cloth finish. The construction was the same as the B. & G. horn, but they had a special name given them by the Hawthorne & Sheble Company. [111]

Q. 50. Were you familiar with the all-brass horn sold by Hawthorne & Sheble Company prior to the early part of 1904?

A. Yes. We did not handle these brass horns and because they were in our opinion of inferior grade to those that we got outside from the Standard Metal or Tea Tray Company, but the Hawthorne & Sheble all-brass horns with which I was then familiar were

(Deposition of Edwin A. Merritt.)

of the same construction as the other all-brass horns made by these other concerns.

Q. 51. Were you familiar with any aluminum horns made by the Hawthorne & Sheble Mfg. Co. prior to March, 1904?

A. Yes; they made a horn that had a spun aluminum bell and the body made of aluminum. The construction and shape was identical with the B. and G. horn. The body was made of a single piece of aluminum that was bent into the shape of a cone and the edges fastened together with a proper seam. To the large end of this cone the spun aluminum bell was fastened. This horn proved of no value and we destroyed what we had left.

Q. 52. Did the Hawthorne & Sheble Mfg. Company ever to your knowledge offer upon the market prior to 1904 a horn of the flower shape having longitudinal ribs on the outside of the horn?

A. No, sir.

Q. 53. Did the Hawthorne & Sheble Mfg. Company ever offer to Douglas & Company during the year 1903 or at any time prior thereto an aluminum horn made of tapering longitudinal sections extending from the small end to the big end of the horn and joined together with seams?

A. Never, to my knowledge, while I was connected with that company. I was so closely in contact with the purchasing of the material that I am sure I would have known if any such horn had been offered the Douglas Phonograph Company. Indeed, my acquaintance with the trade and with the [112]

(Deposition of Edwin A. Merritt.)

product of the Hawthorne & Sheble Co. was such that I am sure that if they offered any such horn for sale I would have known of it.

Q. 54. Did the Hawthorne & Sheble Mfg. Company offer to the Douglas Phonograph Company during the fall of 1903 any flower-shaped horn made of longitudinal steel sections extending from the small end to the large end of the horn and joined together at their edges?

A. They did not. I was closely connected with the purchasing end of the Douglas Phonograph Company during the latter part of 1903 and would have known if any such horn had been offered. In view of the fact that in the fall of 1903 Mr. Nielsen brought his horn to me and I was very much interested in it, I am sure that if any similar horn had been offered to Douglas & Company I would have known of it and would recollect the occurrence. No such horn was offered to my knowledge.

By Mr. DUNCAN.—Complainant's counsel offers in evidence Photographic reproductions of page 30 of the Talking Machine Company of Dec. 15, 1907, which is marked "Edison Advertisement of Flower Horn"; page 10 of "Talking Machine World," which is marked "Second Edison Advertisement," and page 14 of the Talking Machine World of May 15, 1908, which is marked "Federal Advertisement of Flower Horn."

Q. 55. I show you plaintiff's exhibit for identification, page 18, of the Talking Machine World of January 15, 1905, containing an article entitled "A

(Deposition of Edwin A. Merritt.)

great Supply House." Please read this article so far as it applies to the flower horn and state whether it corresponds with the facts as they were within your knowledge on or about the 15th of January, 1905?

A. I have read the article in question. As I have already indicated, the Hawthorne & Sheble Mfg. Company was one [113] of the concerns that put the so-called flower horn upon the market some time in 1904. I came in contact with it, I think, about the beginning of the summer of 1904, but it came upon the market in considerable quantity toward the end of that year. Prior to 1904 I know of no flower horn made by the Hawthorne & Sheble Mfg. Co. or by any other concern or person than Nielsen. The article in question is correct in that it speaks of the flower horn as the latest product in the horn line of the Hawthorne & Sheble Mfg. Co. The article is also correct in stating that these flower horns present a handsome and attractive appearance and are brilliant and clear in reproducing.

By Mr. DUNCAN.—Complainant's counsel offers in evidence the exhibit in question heretofore marked for identification and the same is now marked "Complainant's Exhibit Hawthorne & Sheble Descriptive Article of January 15, 1905."

Complainant's counsel also offers in evidence the exhibit heretofore marked for identification as "Hawthorne & Sheble Advertisement of January 15, 1905," and the same is now marked "Complain-

(Deposition of Edwin A. Merritt.)

ant's Exhibit Hawthorne & Sheble Advertisement of Jan. 15, 1905."

Q. 56. Are you familiar with the book entitled "A Complete Manuel of the Edison Photograph," written by George E. Tewksbury?

A. Yes, I am familiar with that book. We sold many copies of this book when I was connected with the National Phonograph Company at 26th Street and Broadway, at which time the National Phonograph Company was selling the Edison Phonograph. The book in question was published by the United States Phonograph Company of Newark, N. J., in 1897. It was written by George E. Tewksbury, who was closely connected with Mr. Edison's work with the phonograph and contained an introduction by Mr. Edison himself.

Q. 57. Can you produce a copy of the book referred to? [114]

Q. I can and here produce it. This is the same publication that as I have just stated the National Phonograph Company was selling when I was with that concern.

Q. 58. I note that the chapter entitled "Horns and Tubes" opens with the statement "In this chapter we do not expect to say all there is to say about horns or to say the last word about horns, for the last word has not yet been spoken. The horn is still in its experimental stage, although certain definite results have been accomplished and certain facts are known." Please state whether this corresponds with your experience and knowledge as to the horns

(Deposition of Edwin A. Merritt.)

when you were with the National Phonograph Company.

A. It does; the horn at that time was in so experimental a stage that, as I have already pointed out, the talking-machine companies did not supply any large-sized horn as part of the equipment, but only a small horn 14 inches or so in length.

Q. 59. The chapter also goes on to say that "It would astonish the casual reader to learn of the number and thoroughness of the experiments in that direction. Mr. Edison has himself tried a vast number of sizes and shapes out of all sorts of material. Other experimentalists and enthusiasts have gone over the same ground and passed into new paths. They all have come back to the main traveled road, wood, iron, steel, zinc, copper, brass, tin, aluminum, metal, German silver have been tried. Glass, too, and hard rubber. Papier-maché and probably every other product that nature yields or man contrives. The latitude as to form and shape being greater than the resources in material there have been almost innumerable attempts in that line. After all of which it may be said that tin and brass, defective as they are, have been settled upon as the most available, and the forms now known in the trade as the most desirable. Any horn to be good must come out [115] of sound metal and be perfectly joined. Ordinary joining will not do and imperfect metal is a delusion." Please state to what extent the statements just quoted correspond with your own experience and knowledge in the beginning of 1904.

(Deposition of Edwin A. Merritt.)

A. It is true that various materials were tried in the manufacture of horns and it is also true that tin and brass have been settled upon as the most available. Glass was tried prior to 1904 and other materials mentioned in the article. The glass horns proved unsatisfactory, first, because of liability to breakage and also because of the occurrence of undesirable vibrations that interfered with the clear reproduction of the record. Papier-mache horns tended to deaden the sound and prevent what we call a live reproduction.

It is also true that various forms of horns were experimented with prior to 1904. The form of horn finally adopted, whether made of tin or brass was the form shown in the B. & G. horn, an illustration of which I have already pointed out in one of the Hawthorne & Sheble advertisements. Whatever other forms of horns may have been experimented with no horn having the shape of the metal horns put upon the market by Nielsen in the end of 1903 and by his competitors in 1904 and succeeding years and known as the flower horn, had previously been put upon the market. The article quoted speaks of tin and brass as being defective. This was true in certain respects as to the tin and brass horns prior to Nielsen, because those horns were so made that they caused the counter vibrations and interfering tones that prevented the clear reproduction of the record. After the invention of the Nielsen horn, however, the use of tin and brass was not open to this objection and thereafter tin and brass could not properly be described

(Deposition of Edwin A. Merritt.)

as defective for use in horns. The article also says that any horn to be good must come out of sound metal and be perfectly joined, and adds that ordinary [116] joining will not do. This corresponds with what I have already pointed out that in the trade prior to Nielsen it was believed desirable that a metal horn should be made as seamless as possible, the universal idea being that if you could get a perfectly seamless horn the tone production would be better and I suppose that it is what the writer meant when he said in the article above quoted that the horn in order to be good must be perfectly joined. As a matter of fact, it was demonstrated by the Nielsen horn that the tone reproduction would be very much better by cutting the horn up into a number of sections that were joined together with ribs so that these sections would break up and prevent the counter vibrations that occurred in the seamless glass horns and the seamless brass or other horns.

I notice at page 74 of the chapter on "Horns and Tubes" in the Tewksbury book a statement that "Recording-horns are often bound with adhesive tape to check vibration and to make the tones of bass instruments more natural or to give a ring to the bass register of a piano." This corresponds with what I have already said and indicates a recognition that the horns referred to by the writer had an undesirable vibration that Mr. Edison and others sought to prevent by binding the horns with adhesive tape or rattan.

Q. 60. Please examine the cut that appears on page

(Deposition of Edwin A. Merritt.)

70 of the book entitled "A complete Manual of the Edison Phonograph" that you have produced and state how that illustration compares with your knowledge of the construction and shape of horns in 1903 just prior to your acquaintance with the Nielsen horn?

A. This illustration very fairly represents the development of phonograph horns in 1898. In 1903 there was no substantial difference. The only horn used in 1903 prior to Nielsen does not seem to be expressly illustrated in the cut on page 70 of the book referred to, viz., the B. & G. horn. The sixth horn from the right of the cut in question [117] is evidently an all brass horn that more or less approximates the construction of the B. & G. horn. The B. & G. horn is properly illustrated in the Hawthorne & Sheble advertisement of January 15, 1905. The horns of the same construction as the B. & G. were made with aluminum bodies and aluminum bells and also with tin bodies and aluminum bells. The phrase "B. & G.," as I have already stated, was simply an abbreviation of the name "Black and Gold" and that was adopted because after a while the body of this horn came to be painted with or enamelled black and the bell made of polished spun brass. The same shape of horn of course was made of brass throughout in some instances and of other colors and other metals, with the exception of the particular shape of the B. & G. horn, which, however, is closely approximated in the sixth horn from the right in the cut on page 70 that cut shows the condition of the horn

(Deposition of Edwin A. Merritt.)
development in 1903 before Nielsen. Some of the horns shown in this cut are wrapped with tape or rattan or something else in an endeavor to offset the undesirable vibration.

By Mr. DUNCAN.—The book produced by the witness is offered in evidence and marked "Complainant's Exhibit Manual of the Edison Phonograph of 1897."

Deposition closed.

EDWIN A. MERRITT. [118]
Office of Duncan & Duncan.

October 31, 1913.

Met pursuant to adjournment.

Present: JESSIE B. KAY, Notary Public.

FREDERICK S. DUNCAN, Counsel for
Complainant.

[Deposition of William H. Locke, Jr., for
Complainant.

WILLIAM H. LOCKE, Jr., being produced as a witness for complainant, having first been duly sworn, deposes as follows in answer to questions by Mr. Duncan:

Q. 1. State your name, age, residence and occupation.

A. William H. Locke, Jr., Mount Vernon, New York; 53; occupation, I am president of the Searchlight Horn Company, complainant, and am engaged in the real estate business.

Q. 2. Under the laws of what state was the Searchlight Horn Company incorporated?

A. The Searchlight Horn Company was incorpo-

(Deposition of William H. Locke, Jr.)

rated under the laws of the State of New York.

Q. 3. Did the Searchlight Horn Company at any time obtain title to the Nielsen patent 714,441?

A. Yes, they did.

Q. 4. Can you produce the instrument by which the Searchlight Horn Company obtained title to said patent?

A. Yes, I here produce the original document.

The witness produces the document heretofore offered in evidence in connection with the testimony of Mr. Krabbe and marked "Complainant's Exhibit United States Horn Company—Searchlight Horn Company assignment January 4, 1907."

Q. 5. Do you know the signatures that appear at the foot of this document, and did you see those signatures made?

A. I know the signatures and I saw them made.
 [119] Mr. Alexander K. Winter I knew to be president of the United States Horn Company and Mr. John C. De Graw to be its secretary. I was at that time a stockholder and director of the United States Horn Company. The signatures of Alexander K. Winter and John C. Degraw appearing at the foot of the document referred to are the genuine signatures of those gentlemen and I saw them sign the same. The signatures W. H. Locke, Jr., appearing at the foot of said document as president of the Searchlight Horn Company is my own signature and the signature of Charles Percy Bogert is the genuine signature of a gentleman of that name who was secretary of the Searchlight Horn Company. I was

(Deposition of William H. Locke, Jr.)

present when all of the gentlemen referred to signed the document in question when it was delivered by the United States Horn Company to the Searchlight Horn Company. It has been in my possession since that time.

Complainant's counsel again offers the document in question in evidence and the same is marked "Complainant's Exhibit United States Horn Company-Searchlight Horn Company Assignment of January 4, 1907."

Q. 6. How long were you connected with the United States Horn Company?

A. Ever since it was incorporated in the early part of 1905. I was a stockholder and during most of the time I was a director and officer. I am still the treasurer of that company.

Q. 7. Was the United States Horn Company at any time the owner of the Nielsen patent here in suit, and if so by virtue of what document or documents?

A. By virtue of two assignments to said company, one from myself bearing date February 24, 1905, conveying my half interest in said letters patent 771,441, the original of which assignment I now produce and also of an assignment from Christian Krabbe to the United States Horn Company, [120] dated February 24, 1905, conveying his half interest in said patent to said company. I have here a certified copy of the assignment from Mr. Krabbe to the United States Horn Company.

The documents referred to by the witness are the documents that have previously been offered in evi-

(Deposition of William H. Locke, Jr.)

dence by complainant in connection with deposition of Christian Krabbe and that are marked respectively "Complainant's Exhibit Locke-United States Horn Company Assignment of February 24, 1905," and "Complainant's Exhibit Certified Copy Krabbe-United States Horn Company Assignment, February 24, 1905."

Q. 8. Please state whose signature appears at the foot of the document marked "Complainant's Exhibit Locke-United States Horn Company Assignment of February 24, 1905."

A. That is my own signature that I placed at the foot of this document just prior to my delivering the same to the United States Horn Company at the same time Mr. Krabbe signed and delivered his assignment that I have just referred to.

Q. 9. Where is the original assignment from Mr. Krabbe to the United States Horn Company of which Complainant's Exhibit Certified Copy of Krabbe-United States Horn Company Assignment of February 24, 1905," is a copy?

A. I don't know. It should be among the papers of the United States Horn Company or of the Searchlight-Horn Company, but I have made repeated searches to find this document and have been unable to locate it. It must have been lost in some way.

Q. 10. Were you present when Mr. Krabbe signed his original assignment of February 24, 1905, to the United States Horn Company? [121]

A. I was present and I saw him sign and deliver

(Deposition of William H. Locke, Jr.)

the original assignment. My signing and delivering my assignment and his signing and delivering his was part of the same transaction, the purpose being for us to vest the entire title to the Nielsen Patent in the United States Horn Company by reason of our assignments.

Q. 11. In what way did you get the interest in the Nielsen Patent now in suit that you conveyed to the United States Horn Company by your assignment of February 24, 1905?

A. By an assignment from Christian Krabbe to myself dated February 14, 1905, the original of which I produce and which I note is marked "Complainant's Exhibit Krabbe-Locke Assignment of February 14, 1905." The signature at the foot of this document is the genuine signature of Mr. Krabbe.

Q. 12. When did you first meet Mr. Krabbe?

A. Shortly before Christmas in 1904 I was passing his store in Brooklyn and saw a model of a boat in his window that I thought would be a good Christmas present for one of my boys. I went in there and met Mr. Krabbe and while I was looking about at the things in the store I saw a new style of phonograph horn.

Q. 13. What style of horn do you refer to?

A. It was this flower horn. It was a new shape to me. I talked with Mr. Krabbe about the horn and understood that he owned or controlled the patent.

Q. 14. Previous to this time had you been familiar with the phonograph horns on the market?

A. I had not used the phonograph myself, but had

(Deposition of William H. Locke, Jr.)

noticed in a general way the horns that had previously been used. The only horns that I had seen used before this time were the little short horns that were supplied with phonographs or the larger horns that were known by the trade as the B. and G. horn.

Q. 15. Can you produce one of these B. and G. horns? [122]

A. I did produce one when I was a witness in the case of Searchlight Horn Company against Sherman, Clay & Company in the United States District Court, Northern District of California, Second Division, that came to trial in October 1912. The B. and G. horn that I then produced was offered in evidence as "Plaintiff's Exhibit No. 8." The horn was left with the Clerk of the Court and I understand is still an exhibit in that case.

Complainant's counsel offers in evidence the B. and G. horn referred to by the witness that was offered as "Plaintiff's Exhibit No. 8" in the Sherman, Clay & Co. action and the same is marked "Complainant's Exhibit B. & G. horn."

Q. 16. After you talked with Mr. Krabbe in regard to the horn that you saw in his store shortly before Christmas, 1904, did you make some arrangement with Mr. Krabbe in regard to manufacturing and selling this horn?

A. Yes, early in 1905 I bought a half interest in the Nielsen Patent that had then been acquired by Mr. Krabbe and he and I formed the United States Horn Company which went ahead with the manufac-

(Deposition of William H. Locke, Jr.)

ture and sale of these horns.

Q. 17. What kind of horns did the United States Horn Company make?

A. The so-called flower horn.

Q. 18. Can you produce one or more of these flower horns made by the United States Horn Company?

A. Mr. Krabbe, who was a witness in the Sherman, Clay & Co. case that I just referred to, produced two of these horns and they were put in evidence in that suit and marked "Plaintiff's Exhibits 10 and 11."

Q. 19. At the time you became interested in the Nielsen horn in what way was the horn business being carried on generally?

A. The talking-machine companies were supplying a short conical horn varying from 16 to 20 inches or so in length including the bell at the large end of the [123] horn, as part of the equipment of the machine. Most people, however, wanted larger horns which they had to buy from dealers and jobbers generally who got them from independent horn manufacturers. The B. & G. Horn that I have spoken of was the popular and practically the only large horn that was being sold just before the Nielsen horn came into use. The B. & G. horn was made by three or four companies including the Tea Tray of Newark, N. J., the Hawthorne & Sheble Mfg. Company of Philadelphia, Pa., and the Standard Metal Manufacturing Company of Newark, N. J. These three companies sold large quantities

(Deposition of William H. Locke, Jr.)

of the B. and G. horn. Very shortly after I got my interest in the Nielsen horn, or possibly just about that time, these three companies and a number of others started in making the flower horn and soon began to sell that horn in as large quantities as they had previously sold the B. and G. horn. The so-called flower horn created a furore and practically did away with the B. & G. horn. All new trade was in the flower horn and many people who had previously equipped their machines with the B. and G. horn discarded them and bought the flower horn.

Q. 20. What do you mean by the phrase "flower horn"?

A. It was a term first used by Nielsen to describe his horn which had the appearance of a morning-glory or lily. For a while he called his horn the lily horn and sometimes it was called the morning-glory horn, or flower horn, and when the trade generally began to take it up it soon became known as the flower horn.

Q. 21. To what extent did the flower horn business develop during 1905 or succeeding years?

A. Not only did the large manufacturers who had previously been making the B. & G. horn take up the flower horn and make and sell it in place of the B. & G., but a large number of smaller concerns started up making the flower horn. In fact I discovered after I had gotten [124] into the business that some of the manufacturers had started making the flower horn in a small way in the summer of 1904 or

(Deposition of William H. Locke, Jr.)

thereabouts a few months after Nielsen had succeeded in getting his horn on the market in considerable quantities. The flower horn business increased very rapidly during 1905 and 1906 and the horn became recognized by the trade and by the public as so satisfactory that before long the talking-machine companies themselves adopted the flower horn as a part of the standard equipment of their talking machines, discarding the small, cheap horn that they had previously been supplying, adding to the former price of the machines an additional amount varying from \$2.50 to \$7.50 to cover the varying sizes of the horns. The talking-machine companies sold their machines under license agreements with their jobbers and dealers by which the jobbers and dealers had to purchase the entire equipment and had to maintain fixed prices in reselling the same, and the result was that the jobbers and dealers were thereafter compelled to buy the flower horns from the talking-machine companies as part of the equipment of the talking machines. This made it impossible for the independent manufactures of the flower horns to continue making the same, except, of course, those who made contracts with the talking-machine companies to supply them with the flower horns.

The flower horn continued to be practically the only form of horn used with talking-machines down to the time when the cabinet machine came into use which utilizes a smaller sound producer that is concealed in the cabinet.

(Deposition of William H. Locke, Jr.)

Q. 22. After the formation of the United States Horn Company what did that concern do toward manufacturing and selling the Nielsen flower horn?

A. It manufactured several thousands of the horns and we started putting them upon the market. Mr. Krabbe [125] was the active man in the company so far as selling the horns was concerned. Nielsen worked in the factory having charge of the building of the horns.

Q. 23. How long did Nielsen remain with the United States Horn Company?

A. Some six months or so. He then complained of trouble with his eyes and left suddenly for Denmark which was his old home. He was heard of in Denmark a year or so after, but since that time I have heard nothing further as to his whereabouts. I have endeavored to locate him in Denmark, but cannot do so.

Q. 24. What was the construction of the horns that the United States Horn Company made while Nielsen was with it?

A. They were of the same shape and construction as the horn that I first saw at Mr. Krabbe's store. There were a few horns made with the L-shape and butt seam, but most of the horns, and I think practically all of the horns, that were made at the factory on Broadway and Brooklyn were made with the lock seam.

Q. 25. Describe the shape and construction of the horns that the United States Horn Company made and sold.

(Deposition of William H. Locke, Jr.)

A. They were of the flower shape—shaped like a morning-glory, tapering gradually from the small end of the horn to the big end, near which big end, however, the horn flared much more rapidly. The sides of the horn were curved outwards toward the big end. The horn was made up of a number of curved strips of tin, the edges of which were joined together in a few instances by the butt seam, but in most cases by the lock seam.

Adjourned to Saturday, November 1, 1913, at 10 A. M. [126]

Office of Duncan & Duncan.

November 1, 1913.

Met pursuant to adjournment.

Present: Same as before.

Direct Examination Continued.

Q. 26. Describe the shape of each of these strips or sections that were used in making these horns.

A. Each section was small at one end and considerably larger at the other end. The side curved from the small end to the large end of the section. The large end of the section itself had a curved contour. Each section when in place in the horn extended from the small end of the horn to the large end.

Q. 27. What efforts were made by the United States Horn Company to notify the trade of your rights under the Nielsen Patent and to protect those rights?

A. We marked each one of our horns with the word "Patented" and the date of the patent. Our

(Deposition of William H. Locke, Jr.)

advertising matter stated that we were the owners of the Nielsen Patent. Notifications were also sent to various companies manufacturing the flower horns and early in 1906, I, myself called upon several concerns that were manufacturing these flower horns, including all or practically all of the principal concerns. I called on Hawthorne & Sheble Mfg. Co., in February, 1906, and also about the same time, I called upon Mr. Lawrence, president of the Standard Metal Mfg. Company and Mr. Martan, president of the Tea Tray Company, and also met Mr. Conger, treasurer or secretary of that company. Mr. Krabbe had also called upon various concerns and we always notified them of our ownership of the patent and requested them to cease infringing. Our attorney, Mr. Burnham C. Stickney also notified various companies, including the Eclipse Phonograph Company, Hoboken, [127] New Jersey; Messrs. Geller Brothers, 275 West Cheney Street, Newark, N. J., the Tea Tray Company, Newark, N. J.; New Jersey Sheet Metal Company, Newark, N. J.; Standard Metal Mfg. Co. Newark, N. J.; Columbia Phonograph Company, New York City; Hawthorne & Sheble Manufacturing Company, Philadelphia, Pa. I also called on the Victor Talking Machine Company and met their manager, Mr. Geisler, the National Phonograph Company and Columbia Phonograph.

Q. 28. What response did these various concerns upon whom you called or whom you notified make

(Deposition of William H. Locke, Jr.)

to your request that they cease infringing the Nielsen Patent?

A. Each one stated that too many concerns were making these flower horns to warrant it being the first to acknowledge the patent and cease infringement. The invariable response was that if we would stop the infringement by the other the particular one I was talking to would stop. In effect they decline to pay any attention to us until we had fought the case out in the courts.

Q. 29. What did your company do in regard to commencing suits under this patent?

A. The United States Horn Company was succeeded after a short time by the Searchlight Horn Company, the present owner of the Nielsen Patent. Neither the United States Horn Company nor the Searchlight Horn Company had any spare capital other than that was needed immediately for making horns. Together we made between 35,000 and 40,000 horns. We met with considerable difficulty in disposing of these horns because of the widespread infringement carried by so many big companies. We tried to get a footing on the market by introducing a slight modification into the horn, but it was not successful as all of the horns were practically the same, all of them being built along the lines of the Nielsen horn. We were unable to make substantial progress in our business and when the talking-machine [128] companies themselves adopted the flower horn as part of their equipment, such action on their part destroyed the market

(Deposition of William H. Locke, Jr.)

for independent horns and we were therefore forced out of business. Up to that time we had no spare money that would justify us in going into litigation with the big companies that were infringing our patent. We consulted attorneys and they told us it would cost a great many thousands of dollars to fight a suit through to the finish because the great manufacturing companies were very powerful and would oppose us in every way. We made efforts to get money together for this purpose, but were not successful. We also made efforts to persuade some of these big horn manufacturers to take licenses or to enter into some arrangement by which the horn could be made under the patent. No one company was ready to act in advance of the others and the infringement was too widespread to permit of our succeeding with our negotiations. As a result we were unable to do anything in the way of litigation, except that we did bring a suit against Camillus Senne and Peter E. Peterson, doing business under the name of Nova Phonograph Horn Co. This suit was brought by the United States Horn Company in the United States Circuit Court, Southern District of New York, early in 1905. Associated with Peterson and Senne in the Nova Phonograph Horn business was Andrew Andraesen who had formerly been employed as a salesman by Nielsen. Senne and Peterson were making the same kind of a metal horn that Nielsen and the United States Horn Company were making. They were making this metal horn before the Nielsen pat-

(Deposition of William H. Locke, Jr.)

ent issued and declined to stop making the same, but after the patent had issued they allowed judgment to go against them in the suit that we brought and stopped making the metal horn. Afterwards they made a horn of paper in accordance with a patent granted to Senne.

Q. 30. When was it that the Searchlight Horn Company [129] discontinued its business in making and selling horns?

A. That was in May, 1908.

Q. 31. At or about that time did you or your company endeavor to make any arrangement with the talking-machine companies in regard to your Nielsen patent?

A. Yes, I, myself tried to induce various talking-machine companies, among them the National Phonograph Company, to make arrangements with the Searchlight Horn Company for the payment of a royalty for the use by them of the horns containing the invention. I had already notified them that the horns that they were having made and were selling were an infringement upon the Nielsen patent. The Searchlight Horn Company also endeavored to sell and *offer* to sell said patent to the phonograph companies, among them the National Phonograph Company. These negotiations were carried on for a considerable period of time until September, 1909, when I was informed by the National Phonograph Company that no arrangement would be made with us for the purchase of said patents. Thereafter the National Phonograph

(Deposition of William H. Locke, Jr.)

Company continued to infringe the Nielsen Patent in defiance of our rights and the other talking-machine companies adopted the same attitude.

Q. 32. What, then, if anything, did you do toward enforcing your rights?

A. It was late in 1909, when we realized that we could do nothing by negotiation with the phonograph or talking-machine companies and that it would be necessary to bring suit if we were going to get anything out of our patent. I interviewed a number of attorneys and endeavored to secure the services of a patent lawyer, but by reason of the fact that the Searchlight Horn Company was largely in debt and was in financial trouble, I was unable for a long time to secure an attorney. I was told in each case that it would take a great deal of money to fight these big talking-machine companies and the Searchlight Horn Company was without [130] means to engage in so expensive a litigation. In April, 1910, I was introduced to Mr. John H. Miller, an attorney of San Francisco, then in New York, by a mutual friend. He agreed to make a thorough investigation of the matter and if after such investigation he considered the Searchlight Horn Company had a good case he would undertake the suit. Mr. Miller did make an extensive investigation and at various times witnessed actual demonstrations and experiment with various styles of horns. All this took considerable time. Mr. Miller then returned to San Francisco and early in 1911, commenced an action against Sherman,

(Deposition of William H. Locke, Jr.)

Clay & Co., in the United States District Court, Northern District of California, Second Division. This concern was the Pacific Coast distributor of the Victor Talking-Machine Company. That case came to trial before Judge Van Fleet and a jury in October, 1912, and resulted in a judgment in favor of the Searchlight Horn Company sustaining the validity of the Nielsen patent and awarding damages. I was present at the trial of said case and testified on behalf of the plaintiff. After the entry of the judgment I had personal conferences in New York with representatives of Thomas A. Edison, Inc., the successor of the National Phonograph Company, for settlement of their infringement with the idea of avoiding litigation. We were not able, however, to effect a settlement and in March, 1913, the Searchlight Horn Company began suit in equity in San Francisco against Babson Brothers, Incorporated, and later against the Pacific Phonograph Company, these concerns being respectively dealers and distributors on the Pacific Coast of the Edison Phonograph horns. These two suits were joined and preliminary injunctions were granted in that some time ago. I understand that these are the suits in which I am now testifying.

Q. 33. What steps, if any, did the Searchlight Horn Company take to notify the trade of its ownership of the Nielsen patent and of the infringement by that patent on [131] the part of the manufacturers of the flower horn?

(Deposition of William H. Locke, Jr.)

A. I have already stated my personal interviews with various manufacturers of horns and with the phonograph or talking-machine companies. I was acting as an officer of the Searchlight Horn Company in these matters after the early part of 1907. The Searchlight Company's horns were also stamped with the usual patent notice under the Nielsen patent and the Searchlight Horn Company sent circulars to the entire jobbing trade throughout the United States notifying it of our ownership of the Nielsen patent.

Q.34. Can you produce any catalogues of talking-machine companies issued for the season of 1905, illustrating the horns at that time contemplated by the talking-machine manufacturers for use with their machines?

A. Yes, I produce the Victor catalogue evidently issued in the summer of 1904. This shows the B. & G. horn that I have previously testified about. A short time after this date the B. & G. horn was practically superseded by the flower horn.

Complainant's counsel offers in evidence the Victor catalogue produced by the witness and the same is marked "Complainant's Exhibit Victor Catalogue 1904".

Q. 35. Will you produce a certified copy of the certificate of incorporation of the Searchlight Horn Company

A. I produce the same.

Complainant's counsel offers in evidence the certified copy of the certificate of incorporation of the

(Deposition of William H. Locke, Jr.)

Searchlight Horn Company just produced by the witness and the same is marked "Complainant's Exhibit Certified Copy of Certificate of Incorporation of the Searchlight Horn Company.

Q. 36. Can you produce any Hawthorne & Sheble Mfg. Co. price lists or catalogues other than those you have already produced? [132]

A. I have here the confidential trade price list No. 50 of Hawthorne & Sheble Mfg. Co. covering talking machine supplies for 1905-1906; also confidential dealer's trade price list No. 40 for the season 1906-1907; also talking catalogue No. 600 of the Hawthorne & Sheble Mfg. Co. covering talking machine supplies. These publications were issued and circulated through the trade by the Hawthorne & Sheble Mfg. Co. and came into my possession in that way.

Complainant's counsel offers in evidence the documents in question and the same are marked respectively "Complainant's Exhibit Hawthorne & Sheble Price List 1905-1906; Hawthorne & Sheble Price List 1906-1907 and Hawthorne & Sheble Catalogue No. 600."

Complainant's counsel offers in evidence a copy of patent to H. Sheble assigned to the Hawthorne & Sheble Mfg. Co. No. 759, 639, of May 10, 1904; and also offers in evidence "Complainant's Exhibit for Identification Hawthorne Diagrams Nos. 3 and 4 of September 30, 1913"; also Stewart Sketches No. 1 and 2 of September 27, 1913; and the same are marked respectively "Complainant's Exhibit Sheble

(Deposition of William H. Locke, Jr.)

Patent," "Hawthorne Diagrams" and "Stewart Sketches."

WILLIAM H. LOCKE, Jr.

Subscribed and sworn to this 1st day of November, 1913.

JESSIE B. KAY,

Notary Public, New York Co.

Adjourned till Monday, Nov. 3, 1913, 10 A. M.

[133]

Office of Duncan & Duncan.

November 3, 1913.

Met pursuant to adjournment.

Present: Same as before.

[Deposition of Arthur P. Pettit, for Complainant.]

ARTHUR P. PETTIT, being called as a witness for complainant and having first been duly sworn, deposes as follows in answer to questions by Mr. Duncan:

Q. 1. State your name, age, residence and occupation.

A. Arthur P. Pettit; age, 39 years; 439 Manhattan Avenue, New York City; I am connected with the Van Dyck Gravure Company, New York City.

Q. 2. Prior to your present business connection were you at any time connected with the manufacture or sale of phonograph and similar supplies and if so, with whom and during what period?

A. In 1897 or 1898 I was connected with my brother in the business of selling talking machines and supplies in Newark, N. J., under the name of the Edisonia Company. I remained with this con-

(Deposition of Arthur P. Pettit.)

cern until some time in 1900 or thereabouts. About the end of that year or in 1901 I went with Douglas & Company, later known as the Douglas Phonograph Company. I remained with this concern until 1906 or thereabouts.

Q. 3. In what capacity did you act while connected with your brother in the Edisonia Company?

A. I was salesman and purchaser and performed general duties of various sorts in connection with that concern. We did a very large business in talking machines and supplies and I traveled quite extensively in the east both in connection with the purchase and the sale of our goods.

Q. 4. How familiar did you become while you were with the Edisonia Company with phonograph supplies then on the [134] market?

A. It was part of my duties both as buyer and seller for our company to keep closely in touch with the standard phonograph supplies then on the market and also with all improvements and novelties which were offered from time to time. Our company did a large and active business and we were classed as one of the most important handlers of talking-machine supplies in the country and we tried to live up to our reputation.

Q. 5. Did you become familiar during the period referred to with the horn used by the trade and the public in connection with talking machines?

A. I did. We handled large quantities of horns and I visited the various manufacturers of such horn from time to time, purchased large quantities, and

(Deposition of Arthur P. Pettit.)

was thoroughly familiar with the various horns then on the market.

Q. What concerns were then engaged in the manufacture of talking-machine horns?

A. The important manufacturers of horns at that time were the Hawthorne & Sheble Mfg. Co. of Philadelphia, and the Tea Tray Co. of Newark, N. J. The Standard Metal Manufacturing Company commenced manufacturing horns in large quantities some time in 1900 or thereabouts. These three concerns were the largest manufacturers of horns.

Q. 7. Up to the time you went with Douglas & Company, what horns were supplied by the talking-machine companies as a standard part of the equipment of their talking machine?

A. The talking-machine companies supplied only short, cheap tin horns. At the very outset they supplied simply an ordinary cone varying from 14 to 18 inches in length. Then some of them supplied a short horn about 14 to 18 inches or so in length consisting of a narrow cone connected with the larger end of which was a conical bell. I have one of these horns here. Toward the end of the period [135] you refer to or shortly before the introduction of the flower horn the companies were supplying a conical horn with a flaring bell, the total length of the horn being some 14 to 18 or 20 inches. These horns were very cheap and the users of the talking machines nearly always discarded these horns and bought larger ones from the dealers.

Q. 8. About when was the flower horn mentioned

(Deposition of Arthur P. Pettit.)

by you in your last answer introduced?

A. Some time early in 1904 the Nelsen horn appeared on the market in considerable quantities. Toward the end of that year and by the beginning of 1905 practically everybody was making and selling the flower horn.

Q. 9. Prior to the introduction of the flower horn and during the first part of your employment with Douglas & Co., what was the habit of the phonograph companies in regard to supplying horns as part of the regular equipment of their machine?

A. It remained the same as I have already described in connection with the earlier period before I went with Douglas & Company.

Q. 10. You have spoken of the larger horns which you say were bought by the public for use on talking machines prior to the introduction of the flower horn. Please describe the larger horns that were supplied by independent manufacturers and dealers up to the introduction of the flower horn.

A. The larger horns referred to were either all brass or were of the B. & G. type. The all-brass horn had practically the same shape as the B. & G., but both the cone and the bell were made of brass while in the B. & G. horn the cone was made of steel or tin and the bell of brass. These horns were made of varying sizes up to 56 inches and in special cases even larger. The body portion was in the shape of a cone formed of a single piece [136] of metal bent into shape and with the seam braized or soldered or locked. The bell was flaring with a curved con-

(Deposition of Arthur P. Pettit.)

tour and was usually spun or drawn. It was braized or soldered or locked to the large end of the cone. The sides of the cone were straight.

There were some aluminum horns or silveroid horns offered on the market which were made in the same way and on the same lines as the B. and G. horn, except that the metal used was aluminum or an imitation called silveroid. There were also some horns offered having a tin or steel body and an aluminum bell. These were of the same construction and shape as the B. & G. None of these aluminum or silveroid horns, however, had any large sale. The B. & G. horn was the popular horn and was sold in very large quantities.

At one time a glass horn was offered on the market, but because of expense and liability to breakage and other reasons this horn did not succeed.

Q. 11. What horns were purchased by the public generally or supplied by the talking-machine companies as part of their standard equipment after the introduction of the so-called flower horn?

A. As I have already said shortly after the Nielsen horn went on the market a number of other companies including the Hawthorne & Sheble Mfg. Co., the Tea Tray Company and the Standard Metal Mfg. Co. which had previously been making the B. & G. and the all-brass horns took up the flower horn and a number of smaller companies also went into the manufacture of the flower horn. This style of horn was at once recognized by the trade and the public as superior to the former styles of horns which were

(Deposition of Arthur P. Pettit.)

practically superseded by the flower horn, practically all new sales were of the flower horn and many people discarded their old horns and bought the flower type. It was not long before some of the talking-machine companies themselves recognized [137] the superiority of that horn by adopting it as part of the standard equipment of their machines, raising the price of the machines to include the horn.

Q. 12. What was the construction and shape of the so-called flower horn that you say was introduced by Nielsen and shortly afterward adopted by various other concerns?

A. It was called the flower horn because of its resemblance to a morning-glory or a lily. It was sometimes known as the morning-glory or lily horn, but was generally known simply as the flower horn. It was made up of a number of strips or sections running from the small end to the large end of the horn. The edges of the adjoining sections were fastened together on the outside of the horn. The outside of the horn tapered gradually outward from the small end until near the large end when it curved more rapidly out to the end of the bell, thus giving a curved flaring contour.

Q. 13. When did the term "flower horn" come into the trade?

A. It was in connection with the Nielsen horn. I first heard of it in the early part of 1904. It became general during that year.

Q. 14. Prior to the Nielsen horn was the term "flower horn" used in the trade?

(Deposition of Arthur P. Pettit.)

A. I never heard of any such term used nor do I know of any horn to which that term could have properly been applied prior to the Nielsen horn.

Q. 15. When did you first know of the Nielsen horn?

A. I think it was in connection with the sale of that horn by the Bettini Phonograph Company. I may have heard of it before, but as soon as the Bettini Phonograph Company commenced to handle the horn, I saw the horn and from time to time bought some of the horns from the Bettini Phonograph Co. because the dealers wanted them. I came [138] in contact with Nielsen himself and afterwards with Mr. Krabbe and I wanted to get exclusive rights on the horn because I saw that it was a valuable improvement and saw that the trade would want it, but I found that Nielsen had made an arrangement with the Bettini Phonograph Co. that prevented my getting exclusive rights. Later on I made an arrangement with Mr. Krabbe to handle the Nielsen horns.

Q. 16. At the time you made your arrangement with Mr. Krabbe to handle the Nielsen horn what was your position with Douglas & Company?

A. At that time I was manager of that concern.

Q. 17. Previously to your becoming manager what would be your duties in connection with Douglas & Co.?

A. I traveled from Maine to California, acting both as their purchaser and as salesman for supplies.

Q. 18. To what extent did you become familiar with the horns then on the market and the attitude

(Deposition of Arthur P. Pettit.)

of the trade and the public toward such horns?

A. I knew the horn trade thoroughly as it was part of my business to keep in direct touch with it and I naturally became thoroughly familiar with the attitude of jobbers and dealers and users generally toward the horn in regular use and toward new horns proposed for use.

Q. 19. As a result of your own experience and as a result of your knowledge of the view of the trade and of the public, please state whether the so-called flower horn that you say was introduced by Nielsen in 1904 or thereabouts proved more satisfactory than or superior to the horns previously on the market, and if so in what respect?

A. The flower horn proved decidedly superior as was shown by the fact that it very quickly replaced the old horn and drove them out of the market. The flower horn gave much better tone reproduction than the B. & G. horn or the all-brass horn. With both of these horns that had been [139] previously used metallic vibration frequently interfered with the clearness and purity of the reproduction, particularly with certain kinds of voices and instruments. These counter-vibrations of the all-brass horn and of the B. & G. horn were recognized as undesirable and as difficulties that we tried to get over, but these were not done away with until the flower horn came in. The shape of the flower horn gave a rounder and fuller tone than the previous horns. The sectional construction of the flower horn broke up and did away with the objectionable coun-

(Deposition of Arthur P. Pettit.)

ter-vibration and allowed the records to be produced with clearness and without interference. This was such an advance over the prior horns that the flower horn was at once recognized as much better and as soon as they came on the market no one wanted any other kind of a horn.

Q. 20. To what extent, if you know, did the Hawthorne & Sheble Mfg. Co. make the flower horn?

A. Toward the end of 1904, or early part of 1905, they commenced making the flower horn in large quantities and thereafter made it as their regular horn, replacing the B. & G. and the brass horn. Later the Hawthorne & Sheble Mfg. Co. made the flower horn for the Columbia Phonograph Company.

Q. 21. Were you familiar with the horn product of the Hawthorne & Sheble Mfg. Co. prior to 1904?

A. I was. I came in constant contact with their product in horns and frequently called upon that company and visited its offices and factory. I have bought Hawthorne & Sheble horns while with the Edison Company and while with Douglas & Company and I have seen their products in the stores of jobbers and dealers and was thoroughly familiar with it.

Q. 22. Did you while connected with Douglas & Company know of any horns being offered by the Hawthorne & [140] Sheble Mfg. Co. for the Christmas trade of 1903 that had the flower shape and that were made up of steel sections soldered together?

A. I do not know of any such horn being offered

(Deposition of Arthur P. Pettit.)

at that time by the Hawthorne & Sheble Mfg. Co. and I am sure that if any such horn had been offered on the market for the Christmas trade of 1903 I would have known it. The first horn of the flower type that was offered by the Hawthorne & Sheble Mfg. Co. to my knowledge was some time about the summer of 1904 after I had seen the Nielsen horn at Bettini's.

Q. 23. While you were with Edsonia Co. were you familiar with the Hawthorne & Sheble horn products?

A. I was, as I have already stated thoroughly familiar with that product.

Q. 24. Did that company to your knowledge put upon the market prior to 1900 any aluminum horn made up of sections running from the small end to the big end of the horn, the edges of the sections being fastened together by a seam?

A. No such horn was put upon the market by the Hawthorne & Sheble Co. during the period referred to so far as my knowledge goes. I was so closely in touch with the trade at that time and with the Hawthorne & Sheble products that I am sure I would have known of such a horn had it been made and offered by that concern.

Q. 25. While you were with the Edsonia Company were you familiar with the Columbia Graphophone Grand?

A. Yes, we handled that machine.

Q. 26. What horn was used with that machine.

A. A large brass horn.

(Deposition of Arthur P. Pettit.)

Q. 27. Did you ever hear of any aluminum horn made up of strips or sections fastened together at their edges being used in connection with the Columbia Graphophone Grand? A. I did not.

Q. 28. Did you ever hear of any brass horn being put [141] upon the market by the Hawthorne & Sheble Mfg. Co. prior to 1900 made up of four or more longitudinal sections extending from the small end to the big end of the horn and the edges of the sections being fastened together by soldering, braizing or otherwise?

A. No, I have never seen such a horn; most of their horns had only a single seam, possibly some of their horns had two seams in the body opposite each other. The so-called spun brass horns were made usually by folding up a single sheet of metal to form a conical body and soldering or braizing the edges together in a single seam. The bell was drawn or stamped out of a sheet of metal and was placed on a form and spun so as to give the desired shape. The bell was then soldered or braized to the conical body and the whole was polished.

ARTHUR P. PETTIT.

Sworn before me this 3d day of November, 1913.

JESSIE B. KAY,

Notary Public, New York Co. [142]

[Proceedings Had August 4, 1914, 11 A. M.]

*United States District Court, Northern District of
California, Second Division.*

SEARCHLIGHT HORN COMPANY,

Complainant,

against

PACIFIC PHONOGRAPH COMPANY,

Defendant.

SEARCHLIGHT HORN COMPANY,

Complainant,

against

BABSON BROTHERS, INCORPORATED,

Defendant.

**CONTINUATION OF COMPLAINANT'S
PROOFS.**

Office of Frederick S. Duncan, Esq.,
73 Nassau Street, New York City, N. Y.

Tuesday, August 4, 1914, at 11:00 A. M.

Present: JEANETTE C. O'CONNOR, Notary Public.

FREDERICK S. DUNCAN, Esq., Counsel for Complainant, 73 Nassau Street, N. Y.

J. EDGAR BULL, Esq., Counsel for Defendant, 141 Broadway, N. Y.

Met pursuant to notice for the purpose of cross-examination of complainant's witnesses; Messrs. Locke, Krabbe, Petit and Merritt.

(Deposition of William H. Locke, Jr.)

Complainant's counsel now states that pursuant to notice heretofore given to defendant's counsel, and [143] pursuant to order of the Court heretofore made, complainant's counsel now produces, for cross-examination, commencing to-day and continuing on succeeding days, complainant's witnesses: William H. Locke, Jr., Christian Krabbe, Arthur P. Petit and Edwin A. Merritt, whose direct testimony was given by deposition taken in November, 1913.

**[Deposition of William H. Locke, Jr., for
Complainant (Cross-examination).]**

Thereupon WILLIAM H. LOCKE, Jr., having been produced for cross-examination, testifies as follows, in answer to interrogatories by Mr. Bull:

XQ. 37. Referring to the assignment from the United States Horn Company to the Searchlight Horn Company, I notice that the consideration named is \$3,166, in the form of notes. Were those notes paid? A. No, sir.

XQ. 38. None of them paid? A. No, sir.

XQ. 39. I notice that the consideration which is named in the assignment from Nielsen to Krabbe is \$1,764.25. Did that include the purchase of any tools or materials from Nielsen.

A. I do not know.

XQ. 40. Is the United States Horn Company still in existence? A. Yes, sir.

XQ. 41. Has it done any business since it sold the Nielsen Patent to the Searchlight Horn Company?

A. No, sir.

XQ. 42. When did your connection with the

(Deposition of William H. Locke, Jr.)

Searchlight [144] Company begin?

A. When it was incorporated, early in 1906.

XQ. 43. What was your connection with the company at that time? A. I was an officer.

XQ. 44. You were, at the same time, connected with the United States Horn Company?

A. Yes, sir; the president.

XQ. 45. What was the nature of the business of the Searchlight Company down to the time that it secured the assignment of the patent in suit from the United States Horn Company?

A. It had a factory, and considerable machinery, and manufactured horns.

XQ. 46. Of what type of construction?

A. Our principal business was a fluted horn of a little different shape from the regular style of horn, made in four sections and called the "Searchlight" horn.

XQ. 47. How were those sections joined together?

A. They were soldered together.

XQ. 48. With an overlap joint or with a tinsmith joint?

A. With an overlap joint; in fact, the joint was part of the rib.

XQ. 49. Can you make a sketch of that joining?

A. I am not a mechanic, Mr. Bull. But it would be very easy to procure it if you want it. The Thomas A. Edison Company have some. You can also find them in stores [145] all over New York.

XQ. 50. At the present time?

A. Yes, at the present time.

(Deposition of William H. Locke, Jr.)

XQ. 51. Will you be good enough to produce one, for my inspection?

A. Yes, sir. I say "Yes," but I do not know whether I can have one to-day or not. There is no question but that there are some in the Thomas Edison laboratory. They have had them, and no doubt they still have them.

XQ. 52. How many of these horns did the Searchlight Company make?

A. My impression is, from 35,000 to 50,000.

XQ. 53. Did they continue to make them after they secured the title to the Nielsen Patent?

A. Oh, yes.

XQ. 54. Down to the time they ceased doing business? A. Practically so, yes.

XQ. 55. Did the Searchlight Company have any license from the owners of the Nielsen Patent, prior to the time that the assignment from the United States Horn Company to the Searchlight Company was made?

A. No, they did not; though the ownership in the two companies was practically the same.

XQ. 55. What was the name by which the so-called Nielsen horns were sold by the Searchlight Company? What was the trade name?

A. I do not know that we made any Nielsen horns. We tried to put out a horn that we thought would be a novel [146] one, but it did not take, in competition with the flower horn. There was no market for any brass horns at that time in competition with the

(Deposition of William H. Locke, Jr.)

big companies that made the horn a part of their equipment.

XQ. 57. When did the large companies begin to make the horn a part of their equipment?

A. My impression is, the Victor Company in 1906; the Edison Company in 1907; and the Columbia people, in 1906. Of course, the Edison Company was the best customer; that is, the Edison Company business was the most important in the trade.

XQ. 58. By the "Edison Company" you mean the "National Phonograph Company"? A. Yes.

XQ. 59. Prior to 1907, the National Phonograph Company, as I understand it, sold the phonograph without any horn attachment?

A. Without a flower horn. They had a small "B & G" horn that was furnished with each machine, but that was immediately discarded for a larger horn.

XQ. 60. That is to say, up to the time the common practice of the purchaser was to discard the small horn that was furnished with the machine, in order to purchase a larger horn from a dealer? A. Yes.

XQ. 61. As I understand it, what was known on the market as the "Searchlight" horn was the horn which the Searchlight Company began to manufacture prior to the time when the [147] assignment of the Nielsen Patent was made to it by the United States Horn Company, and continued to manufacture down to the time it ceased doing business?

A. Yes.

XQ. 62. Do you understand what is commonly

(Deposition of William H. Locke, Jr.)

known as the tinsmith joint?

A. Do you mean the lock seam?

XQ. 63. Yes. A. Yes, sir.

XQ. 64. You said that these "Searchlight" horns were composed of four sections joined together. Were they joined together with a lock seam?

A. No, sir.

XQ. 65. Were those four sections tapered?

A. The shape of the horn itself was parabolic.

XQ. 66. It was something of the flower shape, was it not? A. Something like it, yes.

XQ. 67. I now show you what purports to be a letter from the Searchlight Horn Company to W. E. Gilmore, President of the National Phonograph Company and signed by you as president of the Searchlight Horn Company; the letter being dated December 26, 1906. Do you recognize this letter?

A. (Examining the letter in question.) Yes, sir.

XQ. 68. Does that letterhead correctly illustrate the form of the "Searchlight" horn manufactured by your company? [148]

A. That is a photograph of it. It does not show all of the inside; only part of the inside of it; and also the outside of it.

(Defendant's counsel offers in evidence the letter in question, marked "Defendant's Exhibit, Letter from Searchlight Horn Company to W. E. Gilmore, dated December 26, 1906. August 4, 1914.")

XQ. 69. Of what material were those "Searchlight" horns made? A. Tin.

XQ. 70. You stated, in your answer to Q. 27, that

(Deposition of William H. Locke, Jr.)

you called on the National Phonograph Company.
What was the purpose of your call?

A. To do business with them.

XQ. 71. That is, to sell them some of your horns?

A. Yes, sir; I also tried to sell them the patent.
When we got out the folding horn they offered me
to handle it exclusively for them, if I could get them
out in time.

XQ. 72. You do not allege that your attorney ever
gave the National Phonograph Company written or
formal notice of the fact that they were infringing on
the Nielsen Patent?

A. I could not say. I talked the matter over with
Mr. Gilmore several times. I tried to interest him in
purchasing the patent and told him that if the Na-
tional Phonograph Company owned the flower pat-
ent, it would be in a very strong position, as far as the
horn question was concerned, in the trade. [149]

XQ. 73. Isn't it a fact that your correspondence
and conversations with officers of the National
Phonograph Company was directed to inducing them
to purchase your horn or purchase your patent?

A. Both.

XQ. 74. You wrote several letters to officers of the
National Phonograph Company, did you not?

A. Yes, sir.

XQ. 75. Did you, in any letter, ever warn them of
an infringement by them of the Nielsen Patent?

A. I cannot say as to that.

XQ. 76. In this letter to Mr. Gilmore, dated De-
cember 26, 1906, you refer to your "Searchlight

(Deposition of William H. Locke, Jr.)

Junior'' horn. What kind of a horn is that?

A. That was a smaller horn, of the same shaps.

XQ. 77. And the same construction, as shown on the letterhead?

A. Yes, sir, the same construction.

XQ. 78. Do you remember the "sample of the horn for "the 'GEM' Machine" referred to in the letter?

A. (Examining the letter in question.) No, I do not. I cannot remember that.

XQ. 79. Have you copies of any of the letters warning parties of the infringement of the Nielsen Patent, sent to them either by your attorney or by your company?

A. I think some of the letters of my attorney are exhibits in some of these actions.

XQ. 80. If one of these letters are in evidence, would you be able to produce a copy of them, or any of them? [150]

A. I think I can find them. They may be in California, or here. Mr. Miller may have them in his possession.

XQ. 81. Is the list which you gave in answer to Q. 27 given from memory? A. No, sir.

XQ. 82. Where did you get that list from?

A. This list was copied from a number of letters handed to me by Mr. Stickney; and I believe the originals are in the possession of Mr. Miller.

(Adjourned here for luncheon, to resume at 2:30 P. M. the same day.) [151]

Office of Frederick S. Duncan, Esq.,
73 Nassau Street, N. Y.

Tuesday, August 4, 1914.

Met (at 2:30 P. M.) pursuant to adjournment.

Present: Same as before.

**[Deposition of Arthur P. Pettit, for Complainant
(Cross-examination).]**

ARTHUR P. PETTIT is now produced by complainant's counsel for cross-examination, in accordance with the order heretofore made herein, and in accordance with the notice by Mr. Bull.

Mr. BULL.—Cross-examination waived.

An adjournment was taken until 11 o'clock A. M. on Wednesday, August 5, 1914, when the cross-examination of Mr. William H. Locke, Jr., will be resumed by Mr. Bull. [152]

Office of Frederick S. Duncan, Esq.,
73 Nassau Street, New York City.

Wednesday, August 5, 1914.

Present: Same as before.

**[Deposition of Edwin A. Merritt, for Complainant
(Cross-examination).]**

EDWIN A. MERRITT, having been produced by complainant for cross-examination, pursuant to order of the court, and to notice to defendant's counsel, testifies as follows in answer to interrogatories by Mr. Bull.

Cross-examination by Mr. BULL.

XQ. 61. You stated in answer to Q. 13, that about November, 1903, you first met Mr. Nielsen, and that at that time he came into the store of the company

(Deposition of Edwin A. Merritt.)

by which you were employed, in an effort to sell his horn. How do you fix that date?

A. I fix that date as right after the first of the year. I went to work for Bettini Phonograph Company, who were right across the way, in the early part of 1904.

XQ. 62. What time in 1904?

A. I think it was about March.

XQ. 63. Have you any written memorandum by which you can fix how long before you went to work for Bettini, that you first saw Nielsen?

A. Except with regard to his patent papers that were gotten up, it was in the early part of 1904 that I had seen him, and I was with Mr. Nielsen when he went there [153] to have those papers drawn up.

XQ. 64. That is the only written memorandum?

A. That is the only written memorandum that I have; yes, sir.

Redirect Examination by Mr. DUNCAN.

RDQ. 65. With whom were you connected when you went with Mr. Nielsen to have his patent papers drawn up?

A. With the Bettini Phonograph Company.

RDQ. 66. By his "patent papers" what do you refer to?

A. The papers that were drawn up by Mr. Tate.

RDQ. 67. Do you refer to the application that resulted in the Nielsen patent here in suit?

A. Yes, sir.

(The signature of the witness is waived by consent of counsel.) [154]

[Deposition of William H. Locke, Jr., for
Complainants (Cross-examination).]

The cross-examination of WILLIAM H. LOCKE, Jr., is now resumed.

Cross-examination by Mr. BULL.

XQ. 83. Acting upon your suggestion, Mr. Locke, I obtained from the Standard Metal Manufacturing Company two horns, which I now show you. Will you please state what these are, and how they came to be in possession of the Standard Metal Manufacturing Company?

A. Those are part of the stock moved to the factory of the Standard Metal Manufacturing Company with our machinery.

XQ. 84. That is, when you made your contract?

A. Yes, about May 1, 1908.

XQ. 85. Is this purple horn a sample of your "Searchlight" horn about which we were talking yesterday? A. Yes; parabolic in shape.

XQ. 86. And which is known to the trade as the "Searchlight" horn? A. Yes.

The horn referred to is offered in evidence, and marked "Defendant's Exhibit, Searchlight Horn."

XQ. 87. Referring to the red horn, which is the folding horn—is this the folding horn referred to in your testimony of yesterday?

A. Yes, sir. It is called, the "Searchlight Folding Horn."

XQ. 88. How many other types or styles of horns did [155] the Searchlight Company manufacture, if any?

(Deposition of William H. Locke.)

A. We made the regular flower horn, but we pushed this Searchlight horn because it was different from anything else on the market.

The red horn, last referred to, is offered in evidence, and marked "Defendant's Exhibit, Searchlight Folding Horn."

XQ. 89. You state in your answer to XQ. 56 yesterday, that you do not know the Searchlight Company made any Nielsen horns. Do I understand you to contradict that statement in your last answer?

A. We made a few, but not of any quantity.

XQ. 90. About how many?

A. More samples than anything else. We made this folding horn to put out in place of the flower horn.

XQ. 91. When did you first put out this folding horn?

A. My impression is that it was late in 1907.

XQ. 92. How many of these folding horns did the Searchlight Company sell?

A. I think about 3,000. The Talking Machine Company themselves made horns part of their equipment.

XQ. 93. How many flower horns did the United States Horn Company make and sell?

A. They made, it seems to me, 3,000 or 4,000. I know they did not sell all of them.

XQ. 94. That was all before the date of the assignment from that company to the Searchlight Company? A. Yes. [156]

XQ. 95. Do you mean to be understood as saying

(Deposition of William H. Locke.)

that the "Searchlight" horns (and by this term I exclude the folding horn) were all marked with the date of the Nielsen patent?

A. I think it was on the small end of the horn.

XQ. 96. Do you find the patent mark stamped on the horn which has just been introduced in evidence?

A. (Examining the horn.) There is nothing stamped on this except "patent applied for." But we applied for a patent on this particular horn; and we got a design of it.

XQ. 97. Having refreshed your recollection by examining the horn, are you prepared now to say that the date of the patent in suit was stamped on the "Searchlight" horns?

A. No. Referring to the small end of the horn I find that there is no date of the Nielsen Patent.

XQ. 98. Will you positively swear that you ever notified the National Phonograph Company that it was infringing the Nielsen Patent in suit?

A. I notified Mr. Gilmore by word of mouth, and also Mr. Pelser, their attorney. It was generally known in the trade that we owned the Nielsen Patent. It was as well known as the flower horn; and we sent a circular to the whole trade, some time in 1906—that is, the jobbing trade—notifying them that any flower horns sold were an infringement on our patent.

XQ. 99. Can you produce a copy of that?

A. I cannot to-day. It is my impression that Mr. Miller has those copies. [157]

XQ. 100. Did not that notice relate to the Billy Patent particularly?

(Deposition of William H. Locke.)

A. No, sir. We thought of purchasing it as we thought there was a market for folding horns, but we found the construction of the Billy Patent for a metal horn was not attractive to the trade. We made up one or two samples.

XQ. 101. Did not your company claim that the reissue of the Billy Patent made it broad enough to cover all flower horns? And did you not so inform the National Phonograph Company?

Mr. DUNCAN.—Objected to as incompetent.

The forepart of the question is the best evidence as to what was claimed; and the balance of the question calls for hearsay and incompetent testimony.

A. I never went into the matter of the claims of the various patents with anybody. Counsel thought that we had a good patent.

XQ. 102. Did you not go into that matter at the time you were trying to sell these patents to the National Phonograph Company?

A. No, sir.

XQ. 103. Did you not try to sell all your patents to the National Phonograph Company?

A. I think I did. I know I tried to sell them the folding horn patent.

XQ. 104. I have requested the Edison people to search their files, and to send to me all letters received from [158] you or from the Searchlight Horn Company; and in compliance with that request I have received the five letters which I now show you. Do you recognize these as being letters written by you?

(Deposition of William H. Locke.)

A. (Examining the five letters.) Yes, sir.

The five letters just referred to are offered in evidence, and marked "Defendant's Exhibits, Correspondence Between Searchlight Horn Company and the National Phonograph Company."

For convenience a copy of each of these letters, as well as the letter introduced in evidence yesterday, in connection with XQ. 68, is included in this record, as follows:

**[Defendants' Exhibits Correspondence Between
Searchlight Horn Company and the National
Phonograph Company.]**

"Searchlight Horn Company.

753-755 Lexington Avenue.

Brooklyn, N. Y., December 26, 1906.

W. E. Gilmore,

National Phonograph Company,

Orange, N. J.

Dear Sir: We send you, by messenger, sample of our Searchlight 'Junior' horn; also sample of the horn for the 'Gem' machine.

Very truly yours,

SEARCHLIGHT HORN COMPANY.

WHL:DA. [159]

W. H. LOCKE, Jr., Pres."

"SEARCHLIGHT HORN COMPANY,

753-755 Lexington Avenue.

Brooklyn, N. Y., December 12, 1906.

W. E. Gilmore, Esq.,

President National Phonograph Company,

Orange, New Jersey.

Dear Sir: We submit for your consideration the

following: The last 'Knock Down' sample horn we sent you we consider the most perfect product of its kind ever turned out, both structurally and acoustically.

If you agree with us, and feel it to your interest to make our horn part of your equipment, we can make it in a different size, if necessary, though we believe the size from the consumer's standpoint is the best, and you can pack the horn in your regular phonograph box in a smaller space than it occupies in our box.

Of course you realize it takes a little time to get the machinery in good condition for the quantity you spoke about, and in this connection we would suggest you seriously consider how long a contract you want to make with us.

Very truly yours,

SEARCHLIGHT HORN COMPANY,

W. H. LOCKE, Jr., Pres.

WHL:DA. [160]

"SEARCHLIGHT HORN COMPANY,

753-755 Lexington Avenue.

Brooklyn, N. Y., December 21, 1906.

W. E. Gilmore, Esq.,

President National Phonograph Company,

Orange, N. J.

Dear Sir: The Edison Gem Phonograph arrived, for which accept our thanks.

Our Mr. Berner says he will have no trouble in making a satisfactory horn for this machine.

In reference to the metal used in the 'Knock Down'

horn being too thin at the small ends of the sections we can use a heavier metal if desirable, though our present horn weighs one-half a pound more than the other horns in the market.

Extending to you the compliments of the season,
I am,

Very truly yours,
W. H. LOCKE, Jr., Pres."

WHL:DA.

"SEARCHLIGHT HORN COMPANY,
753-755 Lexington Avenue,
Brooklyn, N. Y., December 22, 1906.

Mr. W. E. Gilmore,
President National Phonograph Co.,
Orange, N. J.

Dear Sir: Your esteemed favor of the 21st inst. received, and in reply to same would say that we will send you, [161] by express, on Monday, a 16" horn which we can construct on the 'Knock Down' principle so it can be packed with your 'Gem' machine. We will also send you, at the same time, our new 19" Searchlight 'Junior' horn, for your inspection.

The writer will be glad to call on you at your factory on next Thursday. If you care to set any time, kindly let me know, otherwise I will call about 10:00 A. M.

Very truly yours,
SEARCHLIGHT HORN COMPANY.
W. H. LOCKE, Jr., Pres.

WHL: DA.

“SEARCHLIGHT HORN COMPANY,
753-755 Lexington Avenue.

Brooklyn, N. Y., April 21, 1907.

Mr. W. E. Gilmore, Pres.

Dear Sir: We will have a new collapsible horn to submit to you next week, constructed to fold up, substantially in two pieces—which can be packed in a space 6x6x20 inches; but this can be modified to suit your packing-cases. The shape will be satisfactory. The horn will have a 24-inch bell, and we believe it will meet your requirements as it can be produced at a very low cost.

Yours very truly,
W. H. LOCKE, Jr., Pres.” [162]

“New York, July 20, 1909.

Mr. Frank L. Dyer, Pres.

National Phonograph Company
Orange, N. J.

Dear Sir: Enclosed you will find United States letters patent just issued on our Folding Horn. French and English patents have been granted, German to follow. The United States and Foreign rights are for sale. Price reasonable—terms will be made satisfactory.

This horn is the only practical all-metal collapsible horn in the world, and consists of a hinged bell, inner tube, outer tube and nut. It can be made from any weight of metal now used. Its amplifying and tone qualities are equal to a lap-seamed horn, and in quantities can be manufactured at a moderate advance in cost. Made to pack with the talking machine in the

(Deposition of William H. Locke.)

original package, reaching the consumer without re-handling, and in perfect condition, thereby eliminating the necessity for more than one package, a great saving in room, freight and expressage. Can be finished in any color or decoration.

We are also owners of patents 739,954 issued September 29, 1903, 771,441 issued October 4, 1904, and 12,442 reissued October 26, 1905. These are the earliest Flower Horn patents.

Very truly yours,

SEARCHLIGHT HORN COMPANY.

W. H. LOCKE, Jr., Pres."

1271 Broadway, N. Y." [163]

XQ. 105. Did you ever issue any advertising matter respecting the Searchlight parabolic horn?

A. Yes, sir.

XQ. 106. Can you produce copies of such advertisements?

A. I can give you price list, covering our advertisement for the year; full-paid advertisement, double-page advertisement.

XQ. 107. During what year?

A. 1906 and 1907, I think.

XQ. 108. How did this Searchlight parabolic horn compare with the flower horn previously manufactured by the United States Horn Company as to its reproducing qualities?

Mr. DUNCAN.—Objected to as not proper cross-examination, and as incompetent.

A. We always claimed that it was a better horn,

(Deposition of William H. Locke.)

but the trade did not respond; they preferred the flower horn.

XQ. 109. Like all horn manufacturers, you claimed that your horn was the best?

A. Naturally, yes.

XQ. 110. How did the Searchlight folding horn compare with the flower horn previously manufactured by the United States Horn Company in reproducing sound?

Mr. DUNCAN.—Same objection.

A. I never could see any material difference in the reproduction with the folding horn or with the regular flower horn.

XQ. 111. You have spoken about a suit against Senne, doing business under the name of the Nova Phonograph Horn Company. Where was that suit brought? [164] A. In New York City.

XQ. 112. Are you sure of that?

A. Yes, sir.

XQ. 113. And in that suit you obtained judgment by default, I believe you said at the end of your answer to Q. 29?

A. (Examining his previous testimony.) I know we got a judgment against them. I am not a lawyer; I could not really say. I know that the horn was not manufactured any longer; it was discontinued.

XQ. 114. How were the ribs on that horn made; that is, the horn which was made by the Nova Company?

A. They made them both ways—with the so-called butt seam and the tinsmith or lock seam.

(Deposition of William H. Locke, Jr.)

XQ. 115. Are you positive that they used the lock seam? A. Yes, sir, both.

XQ. 116. At the time the Searchlight Company made the deal with the Standard Metal Manufacturing Company, and turned over to that company all the machinery and stock, you were aware of the fact, were you not, that said company was manufacturing flower horns for the National Phonograph Company, and had been for some time past?

A. If your statement is a fact, I have no doubt that I knew the horns were manufactured by them.

XQ. 117. Do you know, as a matter of fact, that the National Phonograph Company purchased any flower horns from the Standard Metal Manufacturing Company at that time? A. Yes, I do.

XQ. 118. Referring to your answer to Q. 29, "between [165] "35,000 and 40,000 horns," did that include the Searchlight parabolic horn?

A. Yes. I think I stated yesterday, from 35,000 to 50,000. I think my statement previously, "from 35,000 to 40,000 was nearer to it.

Redirect Examination by Mr. DUNCAN.

RDQ. 119. In answer to XQ. 55 you stated, with relation to the Searchlight Company and the United States Horn Company, that the "ownership in the two companies was practically the same." What did you mean by that?

A. I meant that the same ownership controlled both companies.

RDQ. 120. Am I right in understanding that the United States Horn Company first put upon the mar-

(Deposition of William H. Locke, Jr.)

ket and tried to sell the so-called flower horn, made in accordance with the horns originally made by Nielsen? A. Yes.

RDQ. 121. What effect, if any, did the competition of other manufacturers of this so-called flower horn have upon the flower horn business of the United States Horn Company?

A. The manufacturers of the so-called "B. & G." horn, having large factories and plenty of machinery, and an old trade connection, took up the manufacture of the flower horn a few months after Nielsen put his horn on the market and made it very hard for us to get a foothold.

RDQ. 122. You have spoken, in your cross-examination of your company trying to put out a somewhat different horn as a novelty, in competition with the manufacturers [166] of flower horns. What horns were you referring to as having been put out by your company as a novelty?

A. The horn called the "parabolic" horn.

RDQ. 123. What was your idea in putting out that horn?

A. To construct a horn so as to get a reasonable price.

RDQ. 124. What was the character of the horns that were being put out by competing manufacturers at the time the Searchlight Horn Company commenced business?

A. The majority of them were flower horns, and the old B. & G. horns.

RDQ. 125. Do I understand you correctly that it

(Deposition of William H. Locke, Jr.)

was the idea of your company that by introducing a novelty, namely, the "Searchlight" horn, you could get business for your company in spite of the competition of the big manufacturers? A. Yes, sir.

RDQ. 126. Did that attempt succeed?

A. No, sir; it did not.

RDQ. 127. Did the parabolic Searchlight horn prove acceptable to the trade?

A. Well, we sold 30,000 to 40,000 of them.

RDQ. 128. What was your idea in going into the manufacture and sale of the folding horn?

A. Our principal idea was to make a horn of the same general construction as the regular flower horn, that could be collapsible and packed in a very small space, and shipped with the talking machine in the original package.

RDQ. 129. Was your company successful in its attempt [167] to introduce and sell the folding horn on a commercial scale?

A. No, sir; at that time the trade had already been notified that one of the companies would make horns part of their equipment.

RDQ. 130. Referring to your negotiations with the National Phonograph Company for the sale to that concern of the patents of the Searchlight Horn Company, I note that your company's letter of July 20, 1909, offered in evidence by the defendant in connection with your cross-examination, refers to these negotiations. How much longer after the date of this letter did those negotiations continue?

A. I should say, at least a month or two. I think

(Deposition of William H. Locke, Jr.)

I stated September. On examination I must have referred to some memorandum I had giving that date or that time. In my examination yesterday, in answer to XQ. 44 I said that I was president of the United States Horn Company. I was a director but not the president; that is a mistake. I was the president of the Searchlight Horn Company.

RDQ. 131. The correspondence with Mr. Gilmore, President of the National Phonograph Company, offered in evidence this morning, apparently relates largely to the "Knock Down" horn. What horn is referred to by that phrase?

A. That refers to the parabolic horn. We made a number of what we call the "Knock Down" horn, which was held together by screws. I understand that Mr. Gilmore at that time was attempting to make a horn that could be packed with the talking-machine in the original package, [168] and the Searchlight folding horn was the result.

RDQ. 132. Were you familiar with the patent law during the period from your first connection with the United States Horn Company down to the commencement of this litigation?

A. Only from the check-book end of it.

RDQ. 133. Did you understand the scope of the claims of the different patents owned or controlled by the United States Horn Company or the Searchlight Horn Company?

A. Only from what I was told by our attorney. I never made a study of it.

RDQ. 134. Referring to your statement made this

(Deposition of William H. Locke, Jr.)

morning in answer to XQ. 98 put to you by defendant's counsel, in regard to notification given to the National Phonograph Company of the alleged infringement of the Nielsen patent, please state what oral notification you gave to Mr. Gilmore or Mr. Pelzer on that subject.

A. It had always run through our minds that the talking-machine companies themselves would take on the manufacture of horns; and therefore I had tried to get the large manufacturers of horns to form one manufacturing concern and to pay me a royalty; but I have been unsuccessful in that event. Then I tried to get the talking-machine manufacturers themselves either to do business with me direct or take over my business; and my leading issue with them was that we had the only patent in existence that covered the flower horn; and, competitively, anyone that owned or controlled this patent would be very strong. Of course I know that they were in constant litigation [169] with each other, and I figured that if I made a connection of some kind with them I would practically do what I had endeavored to do with my competitors; but I was unsuccessful.

RDQ. 135. At the time of your first conference with Mr. Gilmore in regard to flower horn matters, had the National Phonograph Company adopted a horn to be sent out as part of its equipment?

A. No, they had never really adopted a horn, though they sent out a little 14-inch or 18-inch horn with each machine.

RDQ. 136. But they were not, at that time, regu-

(Deposition of William H. Locke, Jr.)

larly sending out a large horn? A. No, sir.

RDQ. 137. At that time who carried the large horns that were used by the users of phonographs—the phonograph companies or dealers and jobbers?

A. The dealers and jobbers bought their horns from the horn manufacturers, as well as the talking machines?

RDQ. 138. Do I understand that the dealers distributed these horns to the public without connection with the phonograph manufacturers? A. Yes.

RDQ. 139. At the time of your first interview with Mr. Gilmore, had the National Phonograph Company bought any flower horns?

A. I believe their export department did some business in flower horns with South America and Australia.

RDQ. 140. Was this fact referred to at the conference [170] between you and Mr. Gilmore?

A. I don't know about that. I sold the National Phonograph Company several thousand Searchlight horns for the same trade; that is, their foreign department.

Recross-examination by Mr. BULL.

RXQ. 141. Referring to the "Knock Down" horns that you have been asked about, and mentioned in the correspondence here in evidence, will you please explain the construction of that more fully?

A. The "Knock Down" horn consisted of these same four sections of the Searchlight parabolic horn, fastened together with three or four screws.

RXQ. 142. That is to say, instead of the sections

(Deposition of William H. Locke, Jr.)

being soldered together, as they are in the exhibit of the Searchlight horn, they were put together with screws? A. Yes, sir.

RXQ. 143. Did you sell any of these?

A. Yes; we sold a thousand, I guess.

RXQ. 144. In other respects they were like this Searchlight horn? A. Yes, sir.

RXQ. 145. Will you please explain more fully your answer to XQ. 71, and state what you have already stated—whatever the facts are? I simply ask you to amplify your answer.

A. After my negotiations with my competitors fell through, I started after the talking-machine manufacturers, among others the National Phonographic Company. The National Phonograph Company were at that time the leading factors [171] in the business. I met Mr. Gilmore and made experiments for him with my Searchlight horn, and my "Knock Down" Searchlight horn; and, four months later, with my folding Searchlight horn. The National Phonograph Company thought so well of it that when they notified the trade that they would make horns part of their equipment they negotiated with me to handle my folding horn exclusively as the horn which they would put out as part of their equipment, provided I could fill their order in time; but as I could not get the dies made in time I could not fill their order, and, therefore, I was compelled to do without their business.

RXQ. 146. You had come to a satisfactory agreement with them as to prices? A. Yes, sir.

(Deposition of William H. Locke, Jr.)

RXQ. 147. Did they determine upon a contract or agreement with you?

A. Of course there was no written agreement. They had a factory at Glen Ridge, but they were not using it at the time. I visited that factory of the phonograph company to see if it would do for our particular business. As I say, there was no written instrument between us; but I believe that if we could have gotten our dies out in time we certainly would have done business.

Redirect Examination by Mr. DUNCAN.

RDQ. 148. When you were unable to get your dies out in time, and therefore had to give up the contemplated contract with the National Phonograph Company, did that [172] company itself manufacture horns and supply horns with its phonographs?

A. No, I made a contract with our two largest competitors—the Tea Tray Company, of Newark, New Jersey, and the Standard Metal Manufacturing Company—to manufacture the horns.

RRDQ. 149. Did the National Phonograph Company then make their horns part of the standard equipment of their talking machine?

A. Yes, they did.

RRDQ. 150. What horn did the National Phonograph Company make part of their standard equipment? A. The regular style horn.

The signature of the witness is waived by consent of counsel.

An adjournment was taken here, to resume (in the same office) at 2:30 P. M. same day. [173]

Office of Frederick S. Duncan, Esq.,
73 Nassau Street, New York City, N. Y.

Wednesday, August 5, 1914.

Met (at 2:30 P. M.) pursuant to adjournment.

Present: Same as before.

**[Deposition of Christian Krabbe, for Complainant
(Cross-examination).]**

CHRISTIAN KRABBE, having been produced by complainant for cross-examination, pursuant to order of the Court, and to notice to defendant's counsel, testifies as follows in answer to interrogatories by Mr. Bull.

Cross-examination by Mr. BULL.

XQ. 92. The purchase price which is named in the assignment from Nielsen to you of the patent in suit, is \$1,764.25. Did that sum cover the purchase of any tools or materials or accounts from Nielsen?

Mr. DUNCAN.—Objected to as irrelevant and immaterial.

A. It covered everything.

XQ. 93. That is, tools and materials on hand, and old accounts? A. Yes.

XQ. 94. Were you interested in the Searchlight Company before the United States Horn Company assigned its patents to the Searchlight Company?

A. No, sir.

XQ. 95. You held no stock of the company before that time?

A. Not in the Searchlight Company; no, sir.
[174]

XQ. 96. How did the prices charged by the United States Horn Company for its flower horn compare

(Deposition of Christian Krabbe.)

with the prices charged by its competitors?

A. They were cheaper.

XQ. 97. Which were cheaper?

A. We sold our horn cheaper.

XQ. 98. Did you sell the flower horn?

A. Do you mean while the United States Horn Company was in existence? Do you mean Nielsen or the United States Horn Company?

XQ. 99. I mean the United States Horn Company.

A. It would be hard to tell exactly. I did not sell phonographs in my store any more. I had gotten out of the firm, as I expected a big thing out of this; and I looked further ahead. I had a little store on Broadway. I cannot remember exactly how the prices were at the time. Do you mean wholesale or retail?

XQ. 100. I am asking whether the prices of the United States Horn Company for its flower horns were higher or lower, or the same as the competitors.

A. About the same thing; that is as close as I can exactly remember it this minute.

XQ. 101. Were the flower horns that the United States Horn Company sold substantially like the flower horns which the standard companies sold?

A. Exactly the same as the Edison horn, except that the Edison horn came more to a point so as to prevent them from getting bent when put on top of each other. [175]

XQ. 102. The Edison Company, as I understand it, never made a horn.

(Deposition of Christian Krabbe.)

A. I mean, what they were selling. These are the "points" that I mean.

(The witness here refers to Complainant's Exhibit, "Edison Advertisement of Flower Horn," and to the points shown projecting at the big end of the horn.)

XQ. 103. If I understand you correctly, your flower horns were exactly like the flower horn shown in Complainant's Exhibit "Edison Advertisement of Flower Horn" except that it did not have the points at the extremities of the ribs, which were put there to enable the horn to rest on the points and prevent the horns marring each other when packed, is that right?

A. Yes, sir; that is what I mean.

XQ. 104. Did you make a profit on the horns that you did sell? When I say "you" I mean the "United States Horn Company."

A. I made a profit, yes.

XQ. 105. And the only reason that your company did not make money was because it did not sell enough horns?

A. No. The big concerns supplied the horns, and we could not sell them. They were making them in such enormous quantities that we could not compete with them. They commenced to cut the prices down.

XQ. 106. The fact is, as I understand it, the Edison Company did not supply a large horn with its machines until after the United States Horn Company ceased doing [176] business?

A. Oh, no. I have got to look that up. I think

(Deposition of Christian Krabbe.)

they furnished them before that time. The Tea Tray Company in New Jersey were making the horns, and the different supply houses got them, and made them in such large lots that the prices had come down. They made them by the thousand, and we had to make them only in a small way. They cut the prices.

The signature of the witness is waived by consent of counsel. [177]

Office of J. Edgar Bull, Esq.,
141 Broadway, New York City, N. Y.

Thursday, August 6, 1914.

Met (at 11:00 A. M.) pursuant to notice.

Present: JOHN H. HILLIARD, Esq., for Complainant.

J. EDGAR BULL, Esq., for Defendant.

[Deposition of Harry T. Leeming, for Defendant.]

HARRY T. LEEMING, a witness produced on behalf of the defendant, being duly sworn, testified as follows:

Mr. HILLIARD.—I object to taking the deposition of this witness on the ground that the time within which depositions *de bene esse* may be taken by the defendant has expired, and I give notice that a motion may be made in due course to suppress the same.

Direct Examination by Mr. BULL.

DQ. 1. What is your name, age, residence, and occupation?

A. Harry T. Leeming, age 33 years; residence, Jersey City, New Jersey; occupation, Assistant Gen-

(Deposition of Harry T. Leeming.)

eral Manager of Thomas A. Edison, Incorporated.

DQ. How long have you been connected with the Edison Phonograph interests? A. Eight years.

DQ. 3. You are familiar with the type of phonograph which is commonly known as the "Cabinet"? [178]

A. I presume you mean the "concealed horn" type.

DQ. 4. Are you familiar with the "concealed horn" type of phonograph? A. Yes.

DQ. 5. Are such machines now manufactured and sold by the Edison Company? A. They are.

DQ. 6. What proportions of the sales of the Edison Phonographs are of the "concealed horn" construction? A. At the present time 99%.

DQ. 7. Do I understand that at the present time 99% of all phonographs, called the "Edison" phonographs, are of the concealed horn type?

A. The amusement machines, yes.

DQ. 8. When did the Edison Company first put out the "concealed horn" machines? A. In 1909.

DQ. 9. Are you familiar with the practice of the other phonograph companies, in a general way, as to what types of machines they are putting out at the present time? A. To some extent, yes.

DQ. 10. Will you state whether it is a fact that at the present time substantially all phonographs that are being sold, whether by the Edison Company or by the other companies, are of the "concealed horn" type?

A. Before I answer that I would like to ask this

(Deposition of Harry T. Leeming.)

question. By phonographs, I presume you embrace talking machines, graphophones and gramophones, in a general way? [179] The "phonograph," of course, is our own instrument; no other company puts out a phonograph.

DQ. 11. I mean to include all sound reproducing instruments by whatever trade name they may be known. A. Yes.

DQ. 12. Was the Edison Company the first to put out the "concealed horn" type machine, or did the other companies precede them?

A. The other companies preceded them.

DQ. 13. Will you please produce standard forms of horns which are now used by the Edison Company with its phonograph?

A. I produce them here now.

(The two horns produced by the witness are offered in evidence and marked "Defendant's Exhibits, Concealed Horn No. 1, and Concealed Horn No. 2.")

Mr. HILLIARD.—Objected to as immaterial.

DQ. 14. Will you please explain the respective use of these two horns?

A. The horns of the character of exhibit No. 1, are used in disc concealed instruments. The horns similar in character to exhibit No. 2 are used in concealed-horn cylinder instruments.

DQ. 15. These, I understand, are standard shapes of horns which are made in different sizes for different size machines? [180]

A. In a general way, yes, sir.

(Deposition of Harry T. Leeming.)

DQ. 16. Will you please produce samples of horns commonly known in the talk machine trade as B. & G. horns and brass horns?

A. I produce them here now.

(The two horns produced by the witness are offered in evidence and marked "Defendant's Exhibits, B. & G. Horn and Brass Horn.")

DQ. 17. For how long a time have you been familiar with horns of the character just produced?

A. Eight years.

DQ. 18. During that whole time?

A. I knew horns of that character prior to that, but I have no definite knowledge.

Mr. BULL.—Direct examination closed.

Cross-examination by Mr. HILLIARD.

XQ. 19. Is this "Defendant's Exhibit, Brass Horn," called the "spun brass" horn?

A. By means of identification, it is.

XQ. 20. Are you using the phrase "spun brass horn" in the trade sense, or in what sense?

A. We generally term those by inches. For instance, 56-inch or 40-inch horns, of that character; or brass horns.

XQ. 21. You call that merely a brass horn?

A. Brass horn would be sufficient for identification, if you gave the inches. [181]

XQ. 22. What is or was a spun brass horn?

A. A spun brass horn is where you have the bell either drawn or spun, the stem being joined by a seam. You naturally could not spin or draw a horn

(Deposition of Harry T. Leeming.)

of that length. (Pointing to the largest horn in evidence.)

XQ. 23. At any time, to your knowledge, was there such a thing as an all spun brass horn?

A. Not to my knowledge, although I do not doubt that some of the short horns for the very cheap instruments were entirely spun, on account of their length permitting it. [182]

[Deposition of Albert C. Ireton, for Defendant.]

ALBERT C. IRETON, a witness produced on behalf of the defendant, being duly sworn, testifies as follows:

Mr. HILLIARD.—Same objection and same notice as with the previous witness.

Direct Examination by Mr. BULL.

DQ. 1. What is your name, age, residence and occupation?

A. Albert C. Ireton; age 50 years; residence, East Orange, New Jersey; occupation, Sales Manager, Amusement Phonograph Sales Department, Thomas A. Edison, Incorporated.

DQ. 2. How long have you been connected with the Edison interests? A. For fifteen years.

DQ. 3. In what capacity?

A. First as salesman; then assistant sales manager; now as sales manager.

DQ. 4. What proportion of the talking-machines made and sold by the Edison Company at the present time are of the concealed horn type?

A. Practically all.

(Deposition of Albert C. Ireton.)

DQ. 5. When did the Edison Company first introduce that type of machine? A. In 1909.

DQ. 6. When the Edison Company introduced that type machine, were other companies making and selling them for some time previous?

A. Yes. [183]

DQ. 7. What companies?

A. The Victor Talking Machine Company.

DQ. 8. Do you recognize the horns which are now before you, marked "Defendant's Exhibits, Concealed Horn No. 1 and Concealed Horn No. 2" as the standard phonograph horns of the present Edison talk concealed-machine? A. I do.

DQ. 8. Please look at the horns which have been offered in evidence, marked "Defendant's Exhibits, B. & G. Horn and Brass Horn," and state whether you are familiar with these types of phonograph horns, and how long you have been familiar with them?

A. I am familiar with them, and have been ever since they were introduced into the talking-machine industry.

DQ. 10. How long ago was that?

A. I think fifteen years. [184]

[Deposition of Rudolph M. Hunter, for Defendant.]

RUDOLPH M. HUNTER, a witness called on behalf of the defendant, being duly sworn according to law, deposes and says, in answer to interrogatories propounded by Mr. Acker as follows:

Q. 1. Please state your name, age, residence and occupation.

(Deposition of Rudolph M. Hunter.)

A. Rudolph M. Hunter; in my 60th year; residence, Philadelphia, Pa.; occupation, consulting engineer and solicitor of patents, with particular reference to all matters relating to inventions.

Q. 2. Please state what experience you have had in connection with musical instruments, and more particularly to the talking machine art as should qualify you to testify as an expert in the present case.

A. I am professionally educated in the technical arts and sciences and have, during the last forty years, had a great deal of experience in the construction of apparatus of various kinds in general manufactures and in use for testing and original research work. In respect to the subject matter of talking-machine art, I might, say that aside from the general knowledge I have upon the development of this art, I also have a general knowledge upon the subject of acoustics and have employed that knowledge not only in a business way but as a musician, having played six or seven instruments aside from devoting a great deal of time to singing. In respect to the talking-machine art, I have been familiar in its development from the time of the Edison tin-foil records in 1878 and '79 and from that time on have been familiar with all the material developments, not only from a matter of study but my actual use of instruments. I have also made a number of improvements in this art myself, but my attention has been more particularly directed in expert capacity in connection with various suits which

(Deposition of Rudolph M. Hunter.)

have been in progress during the last fifteen years, during which time there has not been any moment in which I have not been more or less occupied in respect to such litigated matters, [185] aside from the time which I have devoted in the consideration of questions involving the scientific subject of acoustics with respect to the gradual development of that art. I have been engaged in patent business since 1871 and have had occasion to prepare and prosecute thousands of applications for letters patent, many of which have related to the talking machine art, and as far back as about 1887 I had occasion to publish some articles relating to improvements of my own in this art. Aside from the attention which I have given to the inventions and patents of others, I have made a great many inventions of my own, upon a portion of which I have taken out about 300 letters patent. For the last 35 years I have been constantly engaged in giving expert testimony in litigated matters in the courts and a large portion of my time is devoted to this branch of my profession.

Q. 3. Have you examined United States Letters Patent No. 771,441, granted P. C. Nielsen under date of October 4, 1904, for an improved horn for phonographs or similar machines and if so please state whether you understand the invention disclosed therein?

A. I have carefully examined the letters patent referred to in the question and fully understand the invention as disclosed therein.

Q. 4. Referring to the said letters patent, I direct

(Deposition of Rudolph M. Hunter.)

your attention to the following matter mentioned therein and contained between lines 13 and 19, page 1 of the printed specification which reads as follows "the object thereof is to provide a horn for machines of this class which will do away the mechanical, vibratory, and metallic sound usually produced in the operation of such machine, and also produce a full, even, and continuous volume of sound in which the articulation is clear, full, and distinct." And also to the language contained between lines 71 and 76, printed page 1 of the specification which reads as follows: "and it is the longitudinal ribs B-2 which contribute mostly to the successful operation [186] of the horn, said rib serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof," and will ask you to state from your knowledge and experience relative to horns as applied for reproducing purposes to talking machines as to the soundness of the statements referred to in the said letters patent of which I have quoted relative to the construction of the horn set forth in the said letters patent doing away with or obviating metallic vibration as stated in the said letters patent to take place in connection with the horns of the prior art.

By Mr. HILLIARD.—I object to the question on the ground that it calls for a conclusion of the witness without his having stated his conception of the structure called for and described in the patent and on the ground that he has stated no facts and no

(Deposition of Rudolph M. Hunter.)

facts are assumed on which he bases his opinion.

By Mr. ACKER.—In view of the objection above noted the question is temporarily withdrawn.

Q. 5. I understood you to testify that you had examined the Nielsen letters patent in suit and understood the invention disclosed therein, and I would ask you to state and describe the invention disclosed to you by the said letters patent?

By Mr. HILLIARD.—I object to this question also on the ground that the testimony called for infringes upon the province of the court.

A. The invention of the patent is perhaps most concisely stated in the third claim thereof, which reads:

“3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured at their edges and the outer side thereof at the point where said strips are secured together being provided with longitudinal ribs, substantially as shown and described.”

From this statement of the invention, it is apparent that the [187] general shape of the horn does not involve novelty, as it is there stated that it is tapered in the “usual manner”; but this horn structure is to be made of longitudinally-arranged strips which are to be secured together by outwardly directed ribs. The language states that these ribs are to be at the outer sides and at the edges of the strips.

(Deposition of Rudolph M. Hunter.)

While the patent does not describe exactly just how these outwardly-directed ribs are secured together, it is to be presumed that they are soldered together, as is customary in joining these metal parts where no other method is described. My understanding therefore is, that each strip is provided along its longitudinal edges with outwardly-directed flanges and that these flanges are soldered or otherwise suitably secured together to provide "longitudinal ribs" upon the outer surface of the horn. Incidental to providing these longitudinal outer ribs produced by the flanged edges of the strips in forming the usual tapered horn shape, the plates are described as being tapered so that the larger or bell end of the horn may be greatly larger than the smaller end. There is nothing in the third claim which refers to the tapered construction of the strips, except as it may be implied. In the second claim, these strips are stated as being tapered from one end of said horn to the other, but in this claim, as in the third claim, the edges of the strips are to be outwardly flanged, whereby there is provided the longitudinally-arranged ribs. The essential feature of the construction which I find disclosed in the patent, lies in the provision of the outwardly directed ribs which are indicated clearly in Fig. 3 at b^2 , said ribs being each composed of two outwardly-directed abutting flanges b^3 soldered or otherwise secured together. I further understand that the intent and purpose of this construction, in the mind of the patentee, was to provide a rigidity to the

(Deposition of Rudolph M. Hunter.)

horn structure which [188] was to prevent it from vibrating and thereby impressing upon the sound waves being reproduced extraneous sounds which would have the color or timbre of the metal of which the horn is formed. As shown in Fig. 3, the horn is built up of 12 of these strips, so that a transverse section would show the horn as approximately circular, especially at the smaller end thereof, but I do not understand that the patentee restricts himself as to the number of these strips. From the language of the specification it is quite evident that the patentee intended to provide clearly pronounced ribs which shall have sufficient rigidity to prevent the vibration of the horn itself, or at least to such an extent as would do away with what he terms "the mechanical, vibratory, and metallic sounds usually produced."

Q. 6. From your study of the letters patent in suit, and the invention therein disclosed, what feature is it of the horn which in the mind of the inventor would "do away with the mechanical, vibratory and metallic sounds" and do away "with the vibratory character of horn of this class as usually made and doing away with the metallic sound produced in the operation thereof?"

By Mr. HILLIARD.—I object to the question on the ground that what was in the mind of the inventor must be determined from the specification and patent itself and that the question should be confined within such limits.

(Deposition of Rudolph M. Hunter.)

By Mr. ACKER.—In view of the objection above noted the question is modified so as to read—What feature is it of the horn which you find to support the alleged claim of the inventor would “do away with the mechanical, vibratory, and metallic sound” and equally so do away “with the vibratory character of the horn of this class as usually made and doing away with [189] the metallic sound produced in the operation thereof”?

A. I find that in the specification the patentee provides the outwardly-directed ribs with the intention of accomplishing these results and in these respects he states: “it is the longitudinal ribs b^2 which contribute mostly to the successful operation of the horn, said ribs serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof.” I understand, from his words “contribute mostly,” he recognized that while he has provided the outwardly-directed rib to give the rigidity, there is the provision in the construction of forming these ribs of flanges outwardly extending from the side edges of each of the strips. He unquestionably, by the language I have quoted, considers that the ribs as means of preventing vibration of the horn were the essential feature of his invention.

Q. 7. In view of your testimony in answer to questions 5 and 6, I will ask that question 4 be read to you and answered be made thereto?

(Question re-read to the witness.)

(Deposition of Rudolph M. Hunter.)

A. I have given the subject matter of the Nielsen patent and the claims, as to novelty of invention therein, very careful consideration, not only from a study of the patent itself taken in connection with my knowledge of applied acoustics, but also after having made a large number of tests and experiments; and it is my opinion, based upon this foundation, that the statements contained in the patent as to the results to be secured by the construction therein described and claimed is not warranted by the facts and that the results alleged to be accomplished are in fact *not* accomplished.

As a matter of fact, it is not possible to brace, by ribs or otherwise, a sheet metal horn so that it will not produce vibrations and thereby sounds due to its own construction. Even [190] though the horn were of a solid mass of cast metal it would still vibrate to some extent, but would possibly not produce any appreciable effect upon the sound waves from the reproducer which would be distinguished by the ear. However, when making the amplifying horn of sheet metal there would be no possible way of bracing it to prevent its own natural vibration, although to some extent these vibrations might be modified by proper construction of the horn to give exceptional rigidity. This, however, is not accomplished by the construction which is illustrated and described and specifically defined in the claims of the Nielsen Patent in suit and I will explain more in detail my reasons for the expression of this opinion, inasmuch as it is diametrically opposed to the state-

(Deposition of Rudolph M. Hunter.)

ments which are found in the Nielsen Patent.

If we consider a plate as having bounding edges, the metal is in the best form to be set into vibration. In the Nielsen Patent these strips are provided with flanges along their edges, but these flanges are relatively of small vertical height as compared to the transverse width and area of the strips so that while in a measure they give rigidity to the edges of the plates they do not in any manner interfere with the free vibration of the plates between the flanges. Moreover, the flanges of adjacent plates being soldered together does not interfere with the freedom of vibration of the various plates or strips making up the horn, because the amplitude of vibration is relatively small and the yielding character as well as the nonvibrating character of the solder joining the plates does not interfere with the independence of the plates as separate vibrating elements. These plates, in the actual horn structure, are free to vibrate and vibrate very readily. In my experiments with horns of this character, I found that the vibrations along the line of the ribs was very marked. The plate between the ribs also vibrated very freely, said vibrations being greater toward the large end of the horn than toward the [191] smaller end. Moreover, in the exploration of these vibrations and their extent, I found that the nodes or nonvibrating lines in the plates were numerous and that the rib portions did not produce less vibrations than other portions of the plate due to their natural nodal lines which is present in all plates under vibration, the formation

(Deposition of Rudolph M. Hunter.)

of these nodal or nonvibrating lines in any plate is very complex and varies with the shape and thickness of the plates, as well as the extent of the vibration induced in the plate from the extraneous source, whether it be by vibrating the plate mechanically or by sound waves impinging thereon as takes place in a sound reproducing instrument such as under consideration. In considering the plate surface of an amplifying horn and without attempting to specifically arrange the nodal lines thereon, we may for purposes of illustration assume that the nodal lines will run longitudinally and also transversely, but that the number of those nodal lines will increase transversely considered as the larger end of the horn is approached and moreover, that these nodal lines will vary with wonderful rapidity in view of the production of over-tones or harmonics which are the result of the constantly varying impulse which is given to the plate surface to vibrate owing to the different character of the music or sound which is being projected into the small end of the horn from the reproducer. However, no matter how complex these nodal lines may be, the sheet metal between them is in a state of vibration and no arrangement of ribs such as described in the Nielsen Patent, can possibly prevent such vibrations which takes place between the nodal lines. While the ribs may effect the disposition of the nodal lines, as they undoubtedly do, since they are the lateral edges of each strip, nevertheless these ribs and those edges of the plates or strips vibrate simultaneously as constituting the free

(Deposition of Rudolph M. Hunter.)

edges of the plate, very much the same as a plate [192] having all of its edges free would vibrate under mechanical or induced vibrations. In actual experiments, the free edges of the plates are always in a state of vibration while the nodal points are slightly removed from these edges and such nodal points are further repeated across the plate. The manner of uniting the flanges in the Nielsen structure whereby there are a large number of plates or strips in making up the full circumference of the horn there is great tendency to increase the vibration permissible over what would be the case if such plurality of plates were made as of one integral plate bent into the general shape of the horn, substantially as indicated in Fig. 3 in cross-section without the ribs b². In my experimenting with two horns of substantially the same shape but in which one of the horns was in strips secured together by the flanged side edges forming ribs and the other with the continuous plate bent at the change of angle in the circumference and without any joint or ribs, I found that there was far less vibration in the horn without the ribs than there was in the horn with the ribs adjacent to these bent portions corresponding to the position of the ribs in the Nielsen Patent. As a matter of fact, in the horn without the ribs the continuity of the plate being present and modified by an angular bend, I found that there was far less vibration along the ridge of such bend than there was upon the rib formed upon the similar bend in the other horn made of the flanged strips and outwardly ex-

(Deposition of Rudolph M. Hunter.)

tending ribs to correspond to the Nielsen Patent. This was in exact accordance with what I would have expected because in the one case, notwithstanding that the plates were soldered tightly together, they were nevertheless independent plates when we consider a high state of vibration to which such plates are subjected, while on the other hand the plate which was continuous had no free edges and therefore the angular bend given to it acted very materially to stiffen it to such an extent as to prevent free vibration and under these conditions [193] such line of bending acts as a nodal line, and would be largely equivalent to a plate at its point of clamping, namely, the point by which it may be held, whether at a single point or along a line. Between the flanges on the one part and the mere bend in the plate on the other (considering the two horns), the plates were set into a state of vibration under the normal reproduction of sound and of course, the nodal lines which I have before explained, occurred in these plates but naturally as would be expected, were differently positioned, because in the one case a nodal line was produced along the bend in the horn without the ribs, whereas in the other case, the ribs were free to vibrate, being formed by edges of the strips and hence a nodal line would not be formed thereat. These experiments indicated that the alleged operation or result set out in the Nielsen Patent was not correct as a matter of fact. It did not occur in the construction of a horn ribbed by employment of flanges secured together as therein described.

(Deposition of Rudolph M. Hunter.)

As a further experiment along the line of the alleged invention of the Nielsen Patent, I experimented with several other horns. One of these horns was known as the Villy folding horn of the general character illustrated, for example, in patent No. 739,954 of 1903, "Defendant's Exhibit Villy Patent"; but in the connection between the strips, the hinge was made by alternate loop portions brought into alinement and secured by a long wire, similar to a hinge. The construction provided a very pronounced outwardly-directed series of ribs as well as a series of inwardly-directed ribs. In exploring the vibrations of this horn I found that the vibrations were very free along these lines of the ribs owing to the fact that, as in the case of the Nielsen Patent, the ribs were formed along the edges of the plates or strips and it was quite evident that there was not a particle of rigidity produced sufficient to cause nodal lines to be formed along these [194] ribs. On the other hand, the vibrations were very much greater than would have happened in a horn which was of continuous metal throughout its circumference or of such with one or two ordinary seams.

I also made some experiments with two specially constructed horns, one of which was formed of a relatively straight cone with a bell-mouthed end, such as has been commonly called in this case the B. and G. type, and the other of a construction similar to the general form of the Nielsen Patent with the exception that the seams in this case were constructed

(Deposition of Rudolph M. Hunter.)

similarly to the seams employed in the defendant's horn; that is, an ordinary flat inter-engaging seam such *as used* in sheet-metal work. In these two comparative horns, I took the precaution to have them made of the same surface area so that both of the horns had the same surface to be put into vibration. In the making of these tests, I used the same records and the same reproducing machine, so that there was nothing but interchange of the horns to produce different results. I employed sound records of various characters, some of which reproduced vibrations in the horn much more readily than others, to ascertain if possible, whether there was impressed upon the reproduced music the over-tones due to the presence of the metal of the amplifier more in the case of one horn than the other; and after long and laborious experiments, I came to the conclusion that there was no difference in favor of the horn having the strips united by the longitudinal seams (as in the defendant's horn in controversy) in the production of less metallic sound due to the horn than in the case of the B. & G. horn.

Adjourned for recess until 2 P. M.

Met after recess.

WITNESS.—(Continuing.) [195] In connection with the tests on these two horns last referred to, one of the horns, namely, the B. & G. horn, there was only the longitudinal seam in the building up of the cone and one circumferential seam between the end of the cone and the beginning of the bell, whereas in the other of the horns there were a plurality of longitudi-

(Deposition of Rudolph M. Hunter.)

nal seams for uniting the longitudinal segments. These seams were formed by inter-engaging and flattening the seam portions down into the plane of the section so that there was no ribs in the sense of projections standing radially to the general surface of the horn; but there were thickened portions due to the plurality of thicknesses of the sheet at their line of engagement. This inter-engagement forming the seams was not soldered. In the experiments with these two horns, I found that the vibrations along the line of the seams in the horn last described, was quite pronounced, though somewhat more subdued than the central or free portions of the strips, because of the fact that they were very tightly made and had more or less interference by overlapping of one sheet upon the other. The overlapping had a tendency to produce some interference. This horn did not show, by the tests, that there was any prevention of free vibrations in the surface metal and so far as the reproduction was concerned, the tones produced by the horn having the multiplicity of sections was substantially the same as the reproductions of the B. & G. horn structure. Insofar as impressing of additional tones, due to the metal of the horn, upon the reproduced sound were concerned. While there were certain differences in the general characteristic of the sounds reproduced, this was due to the difference in the shape of the sonorous body of air, owing to the fact that the bell in the one case was much larger in diameter than the bell in the other case. In other words, the difference in the length and diameter of

(Deposition of Rudolph M. Hunter.)

horns vary the tone emitted from the horn without any consideration [196] of the matter of impressing upon the sound vibrations of the reproducer of extraneous sounds due to the special vibration of the metal of the horn itself. It, therefore, is not to be assumed that the fundamental characteristic reproduction of one horn is to correspond exactly to that of another horn, as this will vary with different horns and yet not involve in any manner the question of what material the horn is made of or what vibrations may be set up in the horn itself. The experiments with these horns demonstrated clearly to my mind that the defendant's horn structure did not have ribs longitudinally arranged which prevented the vibration of the horn to overcome the production of sound due to the vibration of the horn itself and therefore did not embody the construction of ribs which could possibly produce the result alleged to be required in the Nielsen Patent in suit. In these two horns, the metal surface available for being put into vibration was made the same, so as to permit a more careful comparison as to the advantage of one construction over the other than could be had if the horns were of different sizes, but this identity of surface area does not change or modify the general principle of operation of these horns, irrespective of the size. In both of them, there was full vibration of the metal surfaces and of the seams, as was also present the nodal lines of quiescence which I have before referred to in connection with the other horn. It is an utter impossibility for any horn of flexible

(Deposition of Rudolph M. Hunter.)

metal to act as an amplifier for strong sound vibrations without producing these metal lines as boundaries to the surfaces of vibration. In addition to the particular horn having the plurality of sections which I have just been referring to, I also experimented with a horn of the same character but of much larger size, and the results with this horn were equally positive in respect to the vibration which was had at the seams when the sounds transmitted into the horn [197] were of sufficient amplitude. In all of these experiments it was noticeable that in soft music, such as the violin and in speaking reproduction, as well as in singing that was not too vigorous, there was very little vibration of the horn structure and, therefore, there were produced no objectionable secondary or over-tones from the horn. When violent music was transmitted in the horns, such as band pieces which contain the resultant of sound from brass instruments, there was a very pronounced vibration of the horn, and in this case, there would be produced some of the higher harmonics which would be impressed upon the reproduced music, but as they were of the same general character as the source of the music, such vibrations and tones produced thereby was not objectionable. These excessive vibrations are not produced by singing or stringed instruments.

Considering these various experiments, supplemented of course by numerous experiments which I have before made from time to time in respect to reproduction of sound by the amplifying horn, I am

(Deposition of Rudolph M. Hunter.)

thoroughly convinced that there is nothing in the construction of horn embodied in the defendant's structure which will prevent vibration of the horn "to do away with the vibratory character" of the horn and "do away with the metallic sound produced in the operation thereof," namely, the essential objects of the Nielsen Patent in suit, and as particularly recited in lines 71 to 77 inclusive of page 1 thereof.

Q. 8. From your experiments as made with the horn of the defendant's construction as involved in the present suit, did you find the mechanical vibrations reduced or minimized to an extent greater than such mechanical vibrations were minimized in the horn of what you have termed the B. & G. construction?

A. I did not. The making up of the horn in sections and connecting them by mechanical longitudinal seams in the horn of defendant's [198] structure, enabled these sections to vibrate more freely than the same area of sections would have vibrated had they been of one continuous sheet of metal bent into the shape of the horn. Furthermore, in the case of the B. & G. type, the continuous surface of the metal curved in the form of a cylinder makes the construction more rigid against vibration than does the structure employing flat surfaces as in the defendant's horn structure, so that there was no minimizing or reducing of mechanical vibrations in the horn of defendant's construction over the B. & G. construction.

(Deposition of Rudolph M. Hunter.)

Q. 9. With the Nielsen Patent No. 771,441 in suit, before you, you will please examine the same and state what foundation you find therein in support of the contention that the construction of the horn therein disclosed will minimize the tintinnabulation or mechanical vibrations and reduce the metallic sound?

A. I find nothing in the Nielsen Patent, in suit, except the mere unsupported statement of the inventor that the ribs which he described accomplished or are intended to accomplish the said result.

Q. 10. Eliminating or disregarding the appearance to the eye created by the shape of the horn of the Nielsen Patent, what advantage does the horn of the Nielsen Patent possess as an amplifier of sound over the horn of the prior art and as exemplified for instance, by the horn designated by you as the B. & G. horn of the prior art?

By Mr. HILLIARD.—Objected to on the ground that the defendant is estopped from denying the utility of the structure of this patent.

A. None whatever. The general shape of the horn is, as the patentee says, a shape “tapered in the usual manner” and which is the conventional shape of horns of musical instruments, they being curved from one end to the other, the horn of the Nielsen Patent is provided with ribs extending outwardly and adapted to this [199] general shape of horn, and as I have pointed out in my deposition, these ribs do not prevent the vibration of the horn as contended

(Deposition of Rudolph M. Hunter.)

for by the patentee, Nielsen, and as recited in the specification. On the other hand, the construction employed in forming the ribs, tends to make the horn more capable of vibration by subdividing the metal into a number of plates or sections and, therefore, the alleged advantage of the structure is not present, and, consequently, there is no advantage in the shape of the horn of the Nielsen Patent over the horns of the prior art.

Q. 11. You say there is no advantage in the shape of the Nielsen horn over the horns of the prior part. Please state whether there is any advantage in the Nielsen horn as an amplifier of sound over the horns of the prior art as exemplified by the B. & G. horn for instance? A. No, there is not.

Q. 12. In your answer to question 7, you repeatedly referred to experiments made by you of horns of different types, and on which you state your conclusions or opinion as expressed in said answer. I will ask, if you have in your possession the instrumentalities by which these experiments were made that you produce the same, and explain for the benefit of the Court exactly how the experiments were made and the nature of the comparison made by you between the horns of the different types utilized by you in making your experiments?

A. I have the various horns and instrumentalities by which these experiments were made, and I will now produce them. I herewith produce the talking machine proper and six horns and also a number of

(Deposition of Rudolph M. Hunter.)

sound records as follows: [200]

German Fidelity March.....	No. 17,577-B
National Emblem March.....	No. 17,577-A
Angel's Serenade.....	No. 88,434
Romance in E flat.....	No. 74,375
Out to Old Aunt Mary's.....	No. 70,078
Celeste Aida	No. 88,127
The Littlest Girl, Part 1.....	No. 70,058
Du Du Liejst mir in Herzen.....	No. 87,182
To Spring	No. 64,264

The horn which I now refer to is the horn designated by me as B. & G. type and which I shall hereafter refer to as "Horn A."

The next horn which I refer to is the horn of defendant's construction which has the same area of sheet metal as the horn just referred to, which I have designated as "Horn A" and this last horn of defendant's construction I will hereafter refer to as "Horn B."

The next horn which I now refer to is the defendant's horn of a larger size and I will hereafter refer to this as "Horn C."

The next horn that I now refer to is a horn having a plurality of strips and with the radial ribs between the strips corresponding to the construction of the Nielsen Patent in suit and I will hereafter refer to this horn as "Horn D."

The next horn that I refer to is the construction of horn which corresponds in general shape to "Horn B" but without the ribs and this I will hereafter refer to as "Horn E."

(Deposition of Rudolph M. Hunter.)

The remaining horn which I now refer to is the Villy horn and hereafter I will refer to that as "Horn F."

In addition to these horns, machines and records, I employed as a convenient manner of exploring the sound waves, a mechanical microphone which I found answered the purpose, as [201] I did not provide an electrical microphone within the length of time available. The instrument employed was essentially a sound-box of the "Exhibition" box construction similar to that upon the machine in and with a long flexible stylus of wire in place of the needle. The aperture at the rear of the sound-box was employed as an ear tube for delivering the sound vibrations to the ear and the wire was employed to be moved over the surface and from place to place in exploring the nature and extent of the vibrations upon the surface of the horns and along the seams and ribs as the case may be. In utilizing this microphone attachment, the best results were obtained by interrupting the contact so that the nerves of the ear were given the result with a fresh impulse with each contact and were, therefore, not tired by continuing buzzing owing to repeated vibrations over long periods. In this manner the touching of the stylus to the surface of the horn would deliver to the ear the effect of the vibrations which were existing at that moment and this was maintained only for a small interval and then repeated so that the effect of the vibrations were fully impressed upon the nerves of the ear without

(Deposition of Rudolph M. Hunter.)

fatiguing them. If the stylus was kept in contact with the surface and dragged from place to place, the distinction between the change could not be as apparent as taking short impressions of the vibration and repeating them over the different portions of the horns, as may be desired. In this manner, points of no vibration or of pronounced vibration were easily detected. In making these experiments I made them, using the different sound records which I have referred to in this answer, some of which were speaking voices, others singing from soft tones to rich vibrous character, others were of violin and again others were of brass bands. In exploring the surfaces, I not only explored the region of the seams and the ribs but also the surfaces longitudinally and transversely. [202]

Owing to the fact that sound records continue to reproduce over a considerable period of time covering any one selection, it is not to be expected that a satisfactory comparison would be had by employing different portions of the record in making two comparisons between different horns, so that I was very careful to select certain definite parts of each sound record which might be considered as characteristic of the reproductions of any particular record, and to repeat these in my tests of comparison, that the clearly defined impression with tests from one horn could instantly be compared with the similar expressions received from the other horns to be compared, just as quickly as the horns could be transferred from the

(Deposition of Rudolph M. Hunter.)

sockets. In this manner, there was no necessity of carrying the impressions of long reproductions and I repeated these experiments over different parts of the record and repeatedly over the same parts so that I might not be deceived in the effect received in my ear during these series of experiments.

The two horns which were intended to have the same surface or area and which were especially designed for a more immediate comparison by general reproduction upon the ear, are those which I have marked "A" and B," the "B" horn being the horn of defendant's structure. The vibrations in this horn for loud music was very pronounced, not only along the surfaces between the seams but along the seams, but for light music and for reproduction of speech there was very little vibration because of the nature of the reproduced sound, which did not have sufficient force to put the metal into pronounced vibration. As between the horns "A" and "B," it is my opinion that the horn "A" had less vibration than the horn "B," and this is as it would be expected to be, because of the continuous curved surfaces of the main body of the horn, they being true circles the tendency to expand and contract is more difficult of accomplishment than in cases where the surfaces [203] are made up of flat transverse lines between the segments. In case of the horn which I have marked "C" which is *of* also of defendant's construction, the same tendency to vibrate along the surfaces between the seams and on the seams was present as in

(Deposition of Rudolph M. Hunter.)

the smaller horn "B" of defendant's construction, but in this case the tendency to vibrate is greater because the horn is larger and consequently the sonorous body and the power exerted thereby was greater. The horn which I have marked "D" corresponds in principle to the horn of the Nielsen Patent, it being made up of a plurality of longitudinal strips, of tapered from one end of the horn to the other, the said strips having their side edges flanged and united to form the outwardly projecting ribs. The horn "E" which is of the same general character as the horn "D" but of continuous metal without the ribs, was employed by me by way of comparison with the horn "D" and as I have before stated, the rib portions of the horn "D" vibrated to a greater extent than did the corresponding unribbed portions of the horn "E." In other words, the making of the horn in separate sections and uniting these sections to form the ribs, produce a tendency to greater vibration of the horn structure than where the surfaces are connected integrally from one continuous piece of metal. I consider that this comparison of the horns "D" and "E" very clearly proves that the ribbed construction of the horn following the principle of the Nielsen Patent in suit, increases the capacity for vibration instead of nullifying the tendency as stated in the patent. The remaining horn "F," while of the same general character in case of the horn "B" and "C" showed very pronounced vibration along the hinged joints which correspond to the seams between

(Deposition of Rudolph M. Hunter.)

adjacent strips or sections. This horns was *particular* rich in vibration notwithstanding that the union between the several sections provided not only inwardly but outwardly directed raised [204] or ribbed portions throughout the length of the horn.

Q. 13. How do you account for the fact that the horn of the Villy construction which you have marked "F" produced greater mechanical vibrations than any of the other horns tested by you?

A. There are several reasons for this, one of which is that the metal of the horn is comparatively thin and the nature of the ribs between the several sections is not as rigid as if said sections were soldered. The result is that these various longitudinal strips or sections more nearly approximate separate plates.

Q. 14. Of the six horns tested by you and produced, which of the several horns from the tests made by you produce the least amount of mechanical vibration or tintinnabulation?

A. In my opinion, the horn "A" produced the least vibration, namely, the B. & G. horn.

Q. 15. For what length of time have you known of the horn which you have designated as the B. & G. and marked as horn "A" been known to you in connection with the talking machine art as an amplifying horn?

A. Horns of this character have been known for about 25 years.

Q. 16. In making the tests which you have referred to for comparison relative to such mechanical vibra-

(Deposition of Rudolph M. Hunter.)

tions as may exist in and between the different horns, did you employ the same talking machine and the same records for each horn? A. I did.

Q. 17. Have you the machine in connection with which the tests were made?

A. I have and herewith produce the same. The machine produced being one of the machines of the Victor Talking-Machine Company, Style V-V, No. 57,222, Type B.

Q. 18. And have you the records on which the tests were made?

A. I have and herewith produce them.

Mr. ACKER.—I shall offer in evidence the horns produced [205] by the witness and testified to as having been employed in connection with the experimental tests referred to in his deposition and ask that the same be marked respectively Defendant's Horn Exhibits "A," "B," "C," "D," "E" and "F."

I also offer in evidence the machine employed by the witness in making the tests referred to in his deposition and ask that the same be marked Defendant's Exhibit Talking Machine "G."

I also offer in evidence two boxes of records produced by the witness as having been the records employed in connection with the making of the said tests and ask that the same be marked Defendant's Exhibit "H," Eight Victor Records.

By Mr. HILLIARD.—I object to the introduction of each of the exhibits as immaterial.

Q. 19. Mr. Hunter, from your knowledge of the

(Deposition of Rudolph M. Hunter.)

talking-machine art, please state the action of recording the voice or musical sounds and the reproduction of the same from the record on a talking machine.

A. In the art of recording and reproducing sounds certain fundamental principles must be kept in mind if reproduction is to be a true delivery of the sounds which were recorded. The greatest difficulties in making a true reproduction can be traced back to the recording. If the recording is accurately done, the reproduction will be approximately perfect, irrespectively of so-called differences in the amplifying horn structures. To make the essential features of recording and reproducing perfectly clear, I will briefly explain the nature of the processes and then indicate the particular things to be kept in mind and in what particulars the difficulty of accurate reproductions arise. In general, recording is accomplished in this manner;—a prepared wax disk is simultaneously rotated and fed transversely to a recording stylus so that it will tend to cut a spiral groove; and during this mechanical operation of engraving the stylus is put [206] into a state of vibration by means of a diaphragm, very similar to the diaphragm of a sound-box upon a reproducing machine. This recording instrument is suitably balanced so that the point of the graver or stylus cuts into the wax surface for an exceedingly small distance. The resistance of the wax being just sufficient to support the weight of the recorder except for the penetrating tendency of the extreme point of the graver or cutting tool. In front of the recorder is a small conical tube, the small end

(Deposition of Rudolph M. Hunter.)

being directed close to the recorder diaphragm, and the larger end of the tube opens toward the *signer* to band according to what is to be recorded. Assuming that the artist sings into the large end of the conical tube, the tones produce vibrations of different amplitude and these, passing through the conical tube impinge, upon the diaphragm of the recorder and cause a corresponding vibration therein which in turns is transmitted to the stylus or graver, so that instead of the spiral groove cut in the wax being a true spiral, such groove has impressed upon it the various sound waves. The resultant spiral groove, such as is seen in the ordinary sound record, is a laterally undulating groove, namely, one with lateral sinuosities, the amplitude of which is the resultant of the primary tones together with the overtones which are sent into the recorder by the voice of the artist. The wax record so produced is employed as a basis from which suitable dies are prepared, and these dies or duplicates of them (the master die always being preserved), are employed to press the commercial records, which are the black discs which are commonly employed by the public in reproducing sound on the ordinary talking machine. The amplitude of the sound waves just recorded being very small, it is not possible for them to produce a sufficient activity in a sound-box of sufficient size to directly give the volume of sound which is desired. In the first instruments which were [207] commercially put upon the market and known as the phonograph, the sound was conveyed to the ear from the sound box by ear

(Deposition of Rudolph M. Hunter.)

tubes, so that the delicate reproductions made from wax records were directly transmitted into the ear without permitting extraneous sounds to modify them. As the commercial introduction of the talking machine became more general and popular, the machines were made to transmit the sound to the hearers through the intervening space of the atmosphere by the employment of amplifiers or horns through which the sound waves from the sound box were transmitted, the said horns acting in the same manner as speaking trumpets in amplifying the sounds delivered at the small end. The operation of horns in this reproduction and amplification is an exceedingly complicated matter; it is so complicated that no scientist has yet been able to evolve any definite rule for calculation. It is not possible to provide any formula that may be followed, and the reason for this, I will explain a little more fully after I have further discussed the question of recording.

Returning to the question of recording, we have two radical defects introduced at the beginning of the operation. One of these is the resistance which is offered to the graver in chipping out the grooves in the wax surface, this operation naturally consuming power which is of considerable magnitude when we keep in mind that the recording must not only be accurate as to the primary notes or tones, but should also be accurate in respect to the overtones of harmonics which are always present in all music and articulation of human beings and which overtones or harmonics are the basis of the different character-

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istics or color of the sound, sometimes called the "timbre" and which enables the same primary note or tone to be reproduced in a variety of ways, that is to say, so that we know whether the tone is produced from the vocal cords, a piano, violin, or a brass instrument. So far as the primary [208] note is concerned all of the instruments produce the same number of vibrations for that particular tone and there is no difference in the vibration of the air, because of that primary tone, except as we impress upon it the overtones or harmonics which are the result of the said primary tone and which follow instantly upon it in the case of the voice. These harmonics are caused by the action of the primary tone produced by the larynx in its passage through the cavities of the mouth and fauces; in other words, if there is a sonorous body of air adjacent to where a primary tone is produced, that sonorous body will be put into a condition of vibration by the vibrations of the primary tone, and if there is more than one such sonorous body present they will all be put in vibration by the primary tone so that they will in turn produce tones of their own which are higher in pitch than the primary tones; and these higher and fainter tones are what is termed overtones or harmonics and it is these tones which give the peculiar characteristic to the different sounds and make them pleasing to the ear. It is to be kept in mind, however, that there are only certain of these overtones which may be produced to advantage, and if there are too many of them, and especially those of the higher pitches, the overtones

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produce a roughness and harshness to the sounds reproduced and make the same very objectionable. The reason of this is, that an overproduction of the higher harmonics produce what is termed beats. If beats take place they produce a condition of dissonance and this is in effect discord. In recording, the greatest difficulty is in transmitting upon the wax surface the desirable overtones, together with the primary tones, and not introduce any of the objectionable overtones which will produce nasal effects, and such nullifying of the true sounds which were sung so as to make the reproduction bad in spots. It is difficult to make the reproductions by the stylus from the sound waves of the voice true without the use of a tapering tube through which the speech or singing is performed, on account of the [209] lack of power of the voice which is not thus concentrated through the horn, and it becomes practically necessary to gather in a large number of waves of sound and concentrate them upon a small surface on the diaphragm of the recorder. In doing this, the heavier tones of the voice, or of whatever is being recorded, set the conical tube into a state of vibration. This state is not only caused by the primary tones, but also by the overtones, and it therefore follows that the tube necessarily produced in turn additional overtones peculiar to itself, and these overtones necessarily are of the higher order because many of them are produced from overtones or harmonics which are already higher than the primary tones. This production of objectionable overtones is recorded in the

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wax surface, so that the actual recording is far from perfect. In the case of some records, the articulation is very much more satisfactory than in other records, and this is due to the fact that in the particular matters being recorded the production of the objectionable overtones by the instrument has to a certain extent been prevented; for example, in talking records and in the case of soft music or gentle singing, the extra overtones are very faintly produced by the recording instrument and consequently in these character of pieces the reproduction is more pure and accurate than in those cases where loud pronounced and sonorous reproductions are being had. In the case of loud singing or music from bands and similar boisterous music it is manifest that the thin metal horn through which the music is transmitted to the recorder diaphragm is put into a state of vibration sufficient to produce the objectionable high overtones and these are, of course, recorded in the wax record along with the musical tones and their lower harmonics intended to be recorded; but as before pointed out, they are additions which are highly objectionable in that they are the overtones of the higher order which produce the [210] harsh and dissonant sounds that are so frequently erroneously attributed to the reproducing horn or amplifier. It is also to be kept in mind that the sound record in the wax, is not only a record of the primary tones of one instrument or person, but of numerous instruments or persons, such as when a singer is accompanied, or when a plurality of voices are singing in unison, or a

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band is playing. Under these conditions, there are a variety of sound waves of different amplitude being recorded at one time and in the single groove and it is manifest that as these waves are of different phase as well as of different amplitude, the ultimate groove must be a differential record in which the primary tones are added or subtracted as the case may be, and not only this, but on top of such a varying record, are the further additions or subtractions of the overtone which go further in modifying the actual sinusoidality of the record groove. It is evident that these additions and subtractions are likely to occur in such a manner as to greatly distort the original tones impressed upon the record, so that they nullify each other at certain intervals, and therefore, instead of obtaining a true reproduction we obtain something which is not real. That this may be more fully grasped I would say we might imagine a band all playing at once but having its different instruments being recorded upon different records and then subsequently reproducing the music from all of the records operated simultaneously, in which case we will have a perfect reproduction of the music of the band. If, however, we attempt to impress all of these sound records into one groove and so distort that groove that it sometimes has greater amplitude and sometimes lesser amplitude than what the primary tones of the band would have required, it follows that the reproduction of the music from the record so produced, must of necessity have large omissions of real, necessary and desirable vibrations as well as have

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numerous harmonics and overtones injected into the reproduction which are out of place [211] or so displaced that they reproduce dissonance or lack of harmony. Whatever is impressed upon the sound record in this manner must necessarily be reproduced by the reproducer of the reproducing instrument, and while the reproducer is normally a reasonably accurate instrument to reproduce and magnify in volume what is given to it to perform, nevertheless it further impresses upon the sounds being reproduced other characteristics which in some degree adds slight change to the timbre or color of the reproduction.

Adjourned until 10:30 A. M., Tuesday morning.

Philadelphia, June 30, 1914.

Met pursuant to adjournment.

Present: Same as before.

WITNESS.—(Continuing.) As I before stated, the operation of the diaphragm of the recorder is accomplished by sound waves delivered to the diaphragm through an inverted cone of metal. As the small end of the cone is closed by the diaphragm of the recording instrument, we have in effect a closed tube into which sound vibrations are delivered by the voice of the artist or from some other source. As the length of this horn is fixed and as its dimensions are fixed, generally, it is evident that the said horn can only produce certain fundamental vibrations and these will be produced as resonance with every corresponding tone which is imparted into the cone by the singer. As this tube is closed at one end, it produces the uneven harmonics and these are the

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harmonics which produce discord or dissonance; furthermore, the closed horn produced "hollow" sounds and the sonorous body of air which it contains, acting as a resonator, always produces these hollow sounds whenever the particular note which is in sympathy with this sonorous body is sounded by the singer or the instrument which is being recorded. This action of the horn produces a series of objectionable secondary sounds and the vibrations [212] thereof are impressed upon the true vibrations of the music or singing which is delivered into the large end of the cone and all of these, as combination tones, are recorded in the single groove upon the record. As the range of the voice is comparatively limited, most of the tones being within the range of one octave, it is manifest that this sonorous body or closed tube formed by the inverted cone, produces upon the actual music desired to be recorded, a large number of overtones as well as primary tones produced by the tube or horn itself, and while these may not of themselves be objectionable separate tones, they produce variable qualities to the recorded sound which are unnatural at places along the record; and these, of course, are reproduced when the record is employed on the reproducing instrument. The "hollow" sounds as well as the discords which are thus impressed upon the record, are all faithfully reproduced by the amplifier or reproducing horn and the reproducer or sound-box connected at its small end, and it is to the recording that the objectionable sounds coming from the reproducer horn are to be

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attributed. It will also be understood that if the sonorous body of air in the horn of the recorder is attuned to a given note, say for example, middle C in the scale, said body of air will be instantly put into vibration with great force every time that this middle C tone is sung or played; so that the recording is not under uniform pressure conditions, but is constantly varying, and as these pressure conditions are the immediate causes of the moving of the graver or stylus which is doing the recording, it is manifest that the graver will be moved to a greater extent whenever these additional resonant impressions are forced upon the natural sound waves of the voice or music. This causes the record to reproduced distortions in the sound desired, approximating in their nature beats; and while they may not be uniform as to intervals, nevertheless they will be impressed upon [213] the music and, to the extent of their reproduction will be discordant to the real music desired to be reproduced. Furthermore, all discords are due to the presence of "beats" in the reproduction and when these beats approximate 30 to the second we have the worst discords; beats between 10 to the second and 70 to the second produce dissonance which is highly objectionable and which, while being worse at 30 to the second, becomes more allowable as we approached the other two extremes. As all beats are produced by the impression of the undesirable uneven harmonics or overtones upon the primary tone, and as the uneven harmonics are pro-

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duced by the closed tubes, we see that in employing a closed inverted cone as the means of transmitting the sounds to the recording diaphragm, we are introducing the very conditions which are apt to impress the music with the beats and the resultant discords and also the "hollow" sounds which are so frequently noticed in reproduction. These are, therefore, primarily due to the recording and not to the reproducing.

Considering now the real function of the amplifying horn and the possibility of it impressing objectionable sounds upon the reproduced music I might call attention to the following facts:—If there was no amplifying horn present, the reproducer would have its diaphragm vibrated in exact accordance with the sinuosities of the record groove of the sound record and these vibrations would set the air in the sound-box into corresponding vibrations and these, acting through the small tubular neck or outlet of the sound-box would produce vibrations of the surrounding air just the same as the sounds emitted from the mouth will put the surrounding air into vibration. However, the force exerted in accomplishing this being relatively weak, there is not power sufficient to put the body of unconfined air into sufficient vibration to transmit the sound to a considerable distance, and it is therefor the custom in the later machines in the talking-machine art to employ amplifiers [214] in the form of horns. As I before stated, the old phonograph type, largely employed ear tubes, which consisted of two rubber

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tubes branching from the sound box and inserted into the ears so as to shut out all extraneous sounds. When the amplifying horns were employed, the result so well known in speaking trumpets came into operation but with the difference that instead of the voice being directly delivered into the small end of the horn, the sound vibrations were produced by the mechanical sound-box under the control of the sound record. This sound-box accurately reproduced all of the sound waves which were recorded during the process of recording and such sound waves were reproduced, whether objectionable or not. The speaking tube acting as an amplifier, magnified these sounds and modified them only slightly. In strengthening the sounds the amplifier operated on the principle of multiplying the fronts of the sound waves at points where they impinge upon the metal of the horn and by the reflections, set up additional sound waves and their corresponding fronts when they in turn impinge upon other surfaces of the horn; and this is continued until, by the employment of the curve of the bell, these sound waves are directed outwardly into the surrounding space, multiplied in quantity so as to have capacity for traversing the intervening space between the horn and the distant hearer. As these waves travel, it is manifest that they have a higher rate of vibration in their action upon the ear than the actual rate of vibration under which they were produced, and while this would have a slight tendency to put the tones out of "pitch" this is not objectionable since all of the tones would be

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increased in the same degree as to pitch and it would only correspond to what would be similar to a piano being tuned to concert pitch or somewhat below it. While the magnification of the number of sound waves is being produced by the amplifying horn there are two things taking place in the horn which must be kept in mind and [215] these are, the vibration of the material of which the horn is composed and the vibration of the sonorous body of air which fills the horn and which is set into a state of vibration by the action of the diaphragm and sound-box. The sonorous body of air in the horn, as in the case of the recording process, will act as a resonator more to certain tones than to others. The internal shape of the horn is so irregular that it provides numerous conditions of the air which are responsive to different tones and it is due to this that some horns in their action may be more pleasing to some persons than to others. The shape of the horn will have a tendency to control the distribution of the air into the atmosphere and by being suitably shaped it *we* may cause the sound waves to reach to a greater distance or to a lesser distance according to what use the instrument is to be put. If the horn flares more, such as in ordinary musical instruments, the French horn for example, the sound will be more fully distributed into the atmosphere than if the horn is longer in relation to its diameter at the large end. Various shapes of horns are used in musical instruments and in reproducing instruments and it has always been a matter of fancy as to just what the general shape of

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the horn may be. They all amplify and they all operate in amplifying under the same general principle, namely, of setting into operation vibrations in the sonorous body of air contained within them, and in doing so multiplying the wave fronts which pass out into the atmosphere.

Considering now the material of which the horn is composed, the amplification with respect to the primary tone is the same for all materials. Primary tones are wholly independent of the character of the material of which the horn is made. These tones are the same whether the horn is of metal, wood or any other material. The only effect which can be put upon the amplified tones which come from the horn is the possibility of additional quality due to the [216] harmonics. As the material of the horn is put into vibration by the sounds produced by the sound-box, these vibrations will produce additional harmonics which may or may not be desirable, but in any event, they are only supplemental to the already formed sounds which are being reproduced and which were characteristic of the recorded sounds, as I have before explained. In the case of the reproducing horn, it is an open tube instead of being a closed tube as in the case of the recorder, because in this case the end in which the sound waves are injected is the small end next to the reproducer or sound-box. We, therefore, have in this reproducing horn the qualities of an open tube and not a closed tube. The open tube produces harmonious overtones, and not only the discordant ones as in a closed tube, so that

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the natural tendency of the amplifying horn is to improve the reproduction and this is independent of the materials of which the horn is composed. It is also to be kept in mind that the horn is seldom over two feet in length and as the sound waves of a woman's voice are from two to four feet, it is manifest that no special pronounced primary tone could be produced by the vibrations in the small end of the amplifier. Whatever vibrations are produced by the action of the horn material itself being set into vibration would be overtones of the sounds being reproduced by the reproducer or sound-box and these would be characteristic of the recorded sounds and not inherent to the material of which the amplifying horn is composed. If the horn is made of metal, it is capable of being put into vibration of greater rapidity than if it were made of wood, and because of its greater rapidity of vibration, it might produce higher harmonics than a corresponding wooden horn would produced. But the production of these harmonics are directly based upon the character of the music or sounds which are delivered to the horn by the sound-box. Furthermore, the amplifying horn does not produce [217] any excessively high harmonics under ordinary musical conditions such as singing or from stringed instruments, such as the violin. In cases where heavy music has been recorded, such as from brass bands, there are more powerful vibrations delivered from the sound-box into the horn and these, if the horn is of thin metal, will produce a greater vibration in the walls of the

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horn than in the other cases referred to. This would tend to produce the harmonics due to these additional loud sounds and as they would be in keeping with the causes, they would not appear as discords or dissonance to the hearer. There is, therefore, in my opinion, no object whatever in providing means for preventing the vibration of the horn walls. If they are prevented to a reasonable degree, the horn would still act as an amplifier to magnify the reproduction to the desired degree and if we stopped all of the vibration of the horn, we would greatly reduce the wave fronts and therefore would impair the magnification of the sound, which it is the function of the horn to increase. Any means which would prevent the vibration of the walls of the horn would be highly objectionable and while too much vibration is not desirable, the natural shapes of the horns when made of an integral structure, gives the strength and rigidity which is suitable. In my opinion, the trouble with the reproduction, which is so frequently attributed to the amplifying horn, should be sought further back, namely, in the recording end of the system instead of the reproducing end.

Q. 20. From your knowledge of the talking machine art and your experience in connection with the working of the said machine and the uses to which the amplifying horns are placed, will you please state whether the ribs present in the sectional horn of the Nielsen patent in suit, constitute anything in connection with the said horn as will serve to influence or maintain the purity or integrity of the recorded

(Deposition of Rudolph M. Hunter.)

sounds reproduced by the use of such a [218] constructed horn?

Mr. HILLIARD.—I object unless this witness first states exactly his conception of the nature of the ribs of the Nielsen horn; that is, their size, degree of rigidity and method of construction.

Mr. ACKER.—In view of the above objection, the question for the time being is withdrawn.

Q. 21. Mr. Hunter, with the Nielsen Patent before you, you will please carefully examine the same and state whether you find disclosed therein any statement relative to the “size, degree of rigidity and method of construction” so far as relates to the ribs referred to in the said letters patent?

A. I do not find any statement as to the thickness of metal, nor to the exact proportions of the flanges which are at the edges of the strips and which are to be united to form the ribs. Fig. 3, which shows the horn in cross-section is the only view which would give any conception of the possibility of the relation of thickness to the other dimensions, but as it is manifest that the drawing is only by way of illustration and not to be taken as a restriction as to the thickness, it is my opinion that there is nothing in the patent which specifically defines what the dimensions of the ribs shall be. The claims of the patent, after defining the general features of construction forming the invention, terminate with the words “substantially as shown and described.” I have assumed that the word “shown” was to be taken as meaning the outward flanged edges of the plates which are

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abutted and secured together by solder or otherwise to form radial ribs from the outer surface of the horn, rather than the particular thickness of which the horn is to be composed.

Q. 22. With the patent before you, I would ask you to examine the same and state in what manner you are instructed from the specification [219] thereof or even from the drawings thereof, as to how or in what manner the flanged edges of the strips composing the horn are to be united or connected together?

A. There is nothing in the patent itself which explains how these radial flanges are to be secured together. In Fig. 3 they are shown as abutting so that two flanges form a radial rib and I see no way of connecting them unless it is assumed that they are soldered together, but the patent is silent as to how to connect them?

Q. 23. In view of your answer to questions 21 and 22, I will ask that question 20 be read to you and an answer be made thereto.

(Question 20 read.)

A. They do not.

Q. 24. From your knowledge of the talking-machine art and experience in connection with the use of amplifying horns employed therewith for the amplification of sound, please state in the operation of such machine, to what you attribute the purity or the maintenance of purity so far as relates to the reproduction of the recorded sound?

A. I consider that the purity of the sound repro-

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duced is dependent upon insuring the purity of the sounds recorded. If the sounds recorded are accurate records of the sound which it is desired to be reproduced, the purity of the sounds from the amplifying horn will be assured. Moreover, it is desirable that the amplifying horn shall be symmetrical. The horn is also best made of material which will give sufficient solidity so as not to be subjected to undesirable vibrations such as might occur in very thin sheet metal, but this has reference to the surface portion of the horn rather than to the general seams and necessary mechanical constructions which are resorted to to build up the horn in the most economical manner. In other words, if the desired general [220] shape of the horn could be formed from one single piece of metal, approximating for example the construction which is resorted to in horn "E" which I have before produced, we would have the best form of a horn if it is to be made of metal. By this, I do not mean to require that the shape shall be the shape shown in this particular horn "E," but that whatever construction as to shape is employed, the horn would best be made of one piece of material; that is, without any so-called strengthening ribs or other additions which might be applied to it for convenience in manufacture or for supposed advantages.

Q. 25. From your knowledge of the talking machine art and your experience in the use of amplifying horns for the reproduction of recorded sounds from talking machines, please state what contribution or addition to the prior art in connection with

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amplifying horns for talking machines was produced by Nielsen so far as relates to disposing of metallic vibrations produced by the action of the sound waves on the walls of the horn and maintaining or preserving the purity or integrity of the recorded sound in the reproduction thereof through the use of the sectional ribs of the amplifying horn of the patent in suit. In answering this question, you will do so with your knowledge and experience in connection with the use of the amplifying horns utilized in connection with talking machines prior to the date of the patent in suit?

Mr. HILLIARD.—I object to the question on the ground that the defendant is estopped from denying the utility of the invention of the patent in suit by reason of having used it.

A. In my opinion nothing which is set out in the Nielsen Patent in suit contributed or added to the prior art in respect to disposing of metallic vibrations produced by action of sound waves on walls of the horn, or for maintaining or preserving the purity or integrity of the recorded sound in the reproduction thereof, as it existed at the date of the Nielsen invention. [221]

Q. 26. From your knowledge and identity as an expert with the talking-machine art, can you state approximately the number of amplifying horns which have been placed on the market by the various manufacturers of talking machines since the year 1895 up to the present time and in giving your answer, you

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will do so irrespective as to the kind or shape of amplifying horns?

Mr. HILLIARD.—I object unless the question be confined to horns of which the witness has had actual knowledge. The facts sought to be proved also not being of a nature which permits of expert evidence or evidence based upon general experience.

A. In view of my intimate connection with the talking machine art I have every reason to approximate the number of horns sold and in use in talking machines since 1895 to be upwards of 4,000,000. By way of explanation of this approximation, I might say that I have had occasion to prepare contracts and to institute legal proceedings in which the number of these instruments were in question and by this I could approximate the aggregate number, I should say that four millions was well within the number of horns which have gone into use in the talking machine art.

Defendant now offers in evidence a printed copy of U. S. Letters Patent No. 722,398, granted E. Bock, under date of March 10, 1903, for a Method of Manufacturing Conical Tubes, and asks that the same be marked "Defendant's Exhibit Bock Patent."

Mr. HILLIARD.—Objected to as immaterial.

Defendant also offers in evidence a printed copy of U. S. Trademark Certificate No. 31,772, granted John Kaiser under registered date July 5, 1898, for a trademark for horn used in connection with sound producing devices and asks that the same be marked "Defendant's Exhibit Kaiser Trademark."

Mr. HILLIARD.—Objected to as immaterial.

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Q. 27. Mr. Hunter, with the list of patent exhibits before you, [222] I would ask that you examine the same and state such similarities and differences which you find to exist between the devices disclosed thereby and the horn of the patent in suit?

A. The general shape of the horn of the Nielsen patent in suit is, as I have before stated, the usual shape which is given to the horns of musical instruments; and aside from the extensive use of this shape in brass instruments, it is also shown in a general way in several of the patents before me. Among these is the Villy Patent of 1903, which shows the horn, not only of the same general shape but as formed of strips tapering from one end to the other and connected at their side edges so as to constitute in the assembled form the amplifying horn which is more particularly illustrated in Figs. 1 and 5. The general shape of this horn is also shown in the Villy horn which I have heretofore produced and marked horn "F." This horn differs from the construction of the Nielsen horn only in the minor details of its construction, namely, in having the ribs along the edges of the tapered strips formed as hinges and arranged alternately on the inside and outside of the horn instead of all being arranged upon the outer side and formed by abutting flanges. Furthermore, in the Villy horn, it is capable of being collapsed for convenience in transportation.

The general shape of the horn, namely the curvature from the small end to the larger or bell-mouth end longitudinally considered, is also shown in the

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Kaiser trademark registration of 1898. As there is nothing in the general shape of the Nielsen form except as to the ribs all being upon the outside, and if we consider this as a feature of design or outward configuration, I find that substantially this same design is illustrated in the design patent of Shirly of 1875. This Shirley Patent does not define the use of the article, but if the shape shown is employed as a horn, it would answer the purpose of a reproducing horn on a [223] talking machine with the same general results as contended for in the Nielsen horn.

In respect to the construction of horn having the longitudinal strips tapering from one end to the other and forming the sides of the horn, I would point out that this structure of horn, aside from being shown in the Villy Patent, is also shown in the Cairns Design Patent of 1877 for a speaking trumpet. A speaking trumpet is an amplifying horn and therefore is directly relevant to the structure of the Nielsen Patent. While a portion of the body tapers with regularity, the taper increases at the end to form the bell. Moreover, the cross-section of the horn in the body, as indicated in the diagram Fig. 3, is polygonal, having straight portions connected by angular juncture precisely as is the cross-section of the Nielsen horn; any difference in the polygonal form being only due to the number of sides and there is no restriction in the Nielsen horn as to this number.

As I have before pointed out the rigidity against vibration of the horn walls is greater where the meeting angle is of one continuous metal than where they

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are flanged and connected as in the Nielsen Patent; it is evident that the speaking trumpet of this Cairns Patent is more correctly designed to prevent extraneous vibrations than is the Nielsen structure. At the extreme bell portion the cross-section is such, as indicated in Fig. 2, that these angular junctures of the side plates provide outwardly directed ribs, said ribs being in a longitudinal direction and acting in a very pronounced way to prevent the vibration of the horn at the juncture of the side surfaces.

Adjourned until 2 P. M. [224]

Met after recess.

WITNESS.—(Continuing.) Another collapsible horn structure shown in the prior patent is that of the patent to Porter of 1900. If we examine Fig. 1 of that patent, it is seen that on diametrically opposite sides there is a double thickness of the material of which the horn is composed, said double thickness being formed of overlapping edges of two longitudinal strips, which strips are tapered from one end to the other. The overlapping portions while not making rigid seams, indicate a reinforcement longitudinally of the horn. In this construction, one of the seams is formed by a flexible strip *c* united to the outer surfaces of two overlapping members *a*, *b* of the strips as shown in Fig. 2 and which strips are ultimately bent into the tubular form illustrated in Fig. 1, and the edges united by the fastening devices *d*, of which there are number arranged along the length of the horn. The patent states that the horn may be made of pressed-board, celluloid, or

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other material capable of ready bending. In my opinion sheet metal could be employed as the basis of the strips.

In respect to the provisions of the polygonal cross-section of the horn with ribbed portions at the angles, said ribbed portions extending outwardly, I would refer to the Design Patent to McVeety and Ford of 1901 and which is essentially for a ship's ventilator. In this horn the end C is of smaller cross-section than the open end D and the horn is made up of longitudinal strips A which are tapering and the side edges of these tapered portions or strips are bent outwardly into engaging seams B, forming ribs, as is very clearly indicated in the several figures. The fact that this horn is given a lateral or axial curve in the direction of its length is not a matter of any importance, as the curvature in this direction is not at all detrimental to the use of such horn for purposes of reproduction of sound. In respect to the use of the ventilator, such action [225] of the air as would be contained within it would be either a circulation from the small end C to the large end D or the conveyance of sound vibration coming up from below and passing through the horn from the small end to the large end precisely as would take place in use of an amplifying horn of a talking machine. It is true that a ventilator of this character is not intended for sound reproduction, but it is nevertheless well known that sounds are distinctly transmitted through it, and often the said ventilators are employed as speaking tubes. Not only is the illustra-

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tion a disclosure of the essential characteristics of the Nielsen construction in that it shows the tapered strips flanged at their side edges and said flanges united to form ribs extending longitudinally of the horn, but the description itself is clear upon this point; for instance, I find described in that patent the following language:

“The general contour of the ventilator is that of a curved tapering figure in the form of a cornucopia, being octagonal in cross-section and having convex ribs at the base and mouth, and similar ribs at the intersection of the plate, forming the walls of the ventilator.”

In my opinion the mechanical construction of the Nielsen horn is substantially shown and described in this McVetty & Ford Patent. I have not considered the particular use of these devices have a material bearing on the question of identity of structure, because the use of amplifying horn and of ventilators were both well known long prior to the date of the Nielsen Patent.

Another example of the construction of a tapering horn which I find in the prior art is that illustrated in the Bock Patent of 1903. In Fig. 3 is shown the tapered construction and in which the tapered tube or horn is formed of two longitudinal strips of tapered shape and having lateral flanges along the edges, said flanges abutting to form radially outwardly directed ribs at a plurality of places about the horn. The patent is stated to be for a method of manufacturing conical tubes; amplifying horns are

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in a general [226] way conical tubes. The patentee further states in respect to the strength of the construction "the conical tube being formed with longitudinal ribs, which impart greater rigidity to the finished tube and permit of its being more readily riveted," which language clearly points out that the tube is provided with longitudinal ribs and the drawing shows that these ribs are radial and extending from the outer surface. In respect to Fig. 3, the patentee says, that it shows "a tube with longitudinal ribs." From the general description, there is no indication as to limitation with respect to the thickness of the metal or to the manner of connecting the flanges into radial ribs, for in several of the figures different manners of connecting the ribs are shown. In Fig. 9 for example the edges of one strip are flanged over the other. In my opinion this patent discloses the feature of a tapered horn having outwardly directed longitudinal ribs and which is capable for use in a talking machine. The degree of the taper is of no consequence and may be anything which the mechanic may desire by properly proportioning the extent of taper given to the sheets from which the tube is formed. The only difference between this construction and that of the Nielsen Patent, other than the number of strips employed, is that the shape of the tapered strips are somewhat different to enable the tube to have the flare which is common and which Nielsen in his claim states was the usual form. This difference, therefore, in my

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opinion, is an immaterial difference, as is also the number of strips employed.

In the Osten & Spalding Patent of 1902 I find disclosed an amplifying horn formed of a combination of wood and metal. In this horn the main body portion is divided longitudinally by the internal ribs E' E'', Fig. 6, and thereby providing a plurality of passages of tapered interiors which unite at each end, that [227] is to say at the small end connected to the sound-box and at the large or bell end of the horn. Moreover, the shape of the amplifier is polygonal and provides angular corners formed between the adjacent or meeting side strips. By this construction it is evident that the horn is reinforced or strengthened by ribs, although these ribs are placed upon the interior of the sides instead of the outer portion of the horn, as in the Nielsen construction. However, this horn of the Osten & Spalding Patent discloses the utility of the polygonal shape with the rigidity of bracing sections which constitute the ribbed effect to the horn as a whole; and while the patentees endeavored to accomplish results in addition to those which might be claimed for the Nielsen structure, they show the broad principle of bracing the side walls of the horn, so that there was nothing left in the Nielsen Patent beyond mere adaptation to his particular polygonal cross-section of the identical radial ribs of the Bock Patent or the substantial equivalent of the ribs of the McVeety & Ford Patent. The side strips of the Osten & Spalding Patent are also tapered from one end to

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the other; and while the bell is formed by additional strips, the angle of the taper is increased so that the taper of the whole tube may be said to be gradual in that the rate of taper at the beginning and ending is different, which is also characteristic of the Villy structure and the McVeety & Ford Patent to which I have before referred.

In addition to the patents which I have referred to, I will simply call attention to the fact that the Fallows Patent of 1876 shows a horn in which the walls are provided with a large number of ribs which are spirally arranged in the direction of the length of the horn. These ribs greatly strengthen the horn structure. [228]

Patent to Gersdorff of 1891 shows a tapered horn or funnel which in Figs. 3 and 4 are of one length and have a gradual curve over a large portion of the length. This tapered horn or funnel is formed of three longitudinal strips gradually varying in width and having their lateral edges flanged so as to inter-engage and form three longitudinal seams arranged equi-distant about the horn or funnel. The seams in this construction is very similar to the seams employed in the defendant's horn; that is to say, they are flat seams and of several thicknesses of the sheet metal of which the funnel is composed. This patent shows the general principle of construction of the series of longitudinal strips of gradual taper and in which the several strips have their side edges flanged and united and differs only from the structure of the Nielsen Patent in that the latter distinctly described

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the flanges as outwardly projecting and the abutting flanges to provide outwardly directed ribs. This patent to Gersdorff does not show outwardly projecting ribs but shows flat seams extending lengthwise of the horn or funnel.

The Clayton Patent of 1898 shows a tapered amplifying horn with a very pronounced flare. In the construction shown in this patent the device is intended to be used as an audiphone for collecting and transmitting sound vibrations to the ear. Considering, however, the construction of the flared horn element A, I find that it is shown as having a large number of radial ribs and the said ribs being so spaced that there is a diverging or widening between them from the center, or more correctly speaking, from the small end of the horn to the outer or bell-mouthed end. At the small end of the horn there is provided a diaphragm F which corresponds to the diaphragm of talking-machine sound-box in respect to its location. While there are no seams shown in this horn and while the whole horn is indicated as stamped from a [229] single piece of sheet metal, nevertheless, it is reinforced longitudinally by ribbed portions and the surfaces between the ribs is tapering from the small end of the horn to the outer edge thereof. The general principle of reinforcing or strengthening the longitudinal construction of the horn is shown in this patent and hence the invention or difference of the Nielsen structure over this prior art taken by itself is in the particular manner of providing the strengthening ribs and adapting them

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to the old and well known shape of horn shown in the prior art prior to the date of the Nielsen invention.

The patent to Marten of 1903 illustrates a form of horn similar to what I have heretofore designated as the B. & G. type and which is exemplified in the horn which I have designated as horn "A." Another horn of this same general character is shown in Fig. 1 of the patent to Runge of 1902.

Q. 28. What distinction, if any, do you make between an amplifying horn, a megaphone and an acoustic horn, so far as relates to the amplification of sound?

A. None whatever. The various structures mentioned in your question are all for amplifying; and while a megaphone might be used without any particular care as to nicety of reproduction since the question of carrying sound to a distance is the main thing desired, and while an amplifying horn especially intended for reproduction of music and articulate sound for entertainment might involve some of the finer distinctions in respect to purity of the overtones of the record, nevertheless the general principle of construction and operation are the same and they are interchangeable as to their uses if so desired.

Q. 29. You have testified concerning the Villy Patent in evidence; I would ask you to please to refer to the Villy Patent and state how do the strips composing the sectional horn, shown and described, compare as to curvature and taper to the strips or

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sections [230] composing the horn of the patent in suit?

A. I have made the comparison called for in the question and I find that the shape of the strips are in all material respects identical so far as the surface area are concerned in their relation to the production of the continuous curve of the horn whereby it approximates the usual curve of brass band instruments. In the Villy Patent there are a large number of these strips, tapered from one end to the other and which strips are connected together along their curved edges side by side in such a manner that when the horn is set up into its operative condition there is a rigid horn produced of the same general character as is illustrated in the Nielsen Patent in suit. In the patent of Villy, it is stated that the strips are formed "of paper, wood, linen or other preferably flexible material" and from this I understand that any suitable flexible material may be employed in the building up of the horn. I am confirmed in this opinion by reference to the paragraph preceding the claims in which the patentee says:

"I do not limit the application of my invention to any particular method of building up the segments or to any special curve or configuration of the same, and I vary the method of jointing and stiffening them to suit the material from which the strips are constructed and the foundation or base fabric upon which the flexible material forming the strips is secured."

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As shown in the Villy horn, which is marked "Horn F," we have an example of the use of thin sheet metal as the material of which the tapered strips may be formed as equivalent of the strips of wood or other material referred to in the patent. With respect to the rigidity of the horn in its set-up condition ready for use, the patentee states:

"The angles formed by the meeting of the hinged segments when extend form, as it were, ribs, giving rigidity to the trumpet form."

Page 1, lines 64-66.

I consider this a clear statement showing the purpose [231] of obtaining rigidity as well as special curvature, such as is disclosed in the Nielsen Patent in suit. Further on in this specification, the patentee also says:

"My horn, owing to the curvature of the edges of the strips, is self-sustaining and requires no additional stiffening or sustaining devices.

* * * " Page 2, lines 51-54.

The general tapered shape of the strips is clearly illustrated in Fig. 3 and is manifest from the examination of Figs. 1 and 5. In the particular connection between adjacent plates illustrated in Fig. 6 there are two metal strips K which are bent over into hook shape so that they interengage approximately forming a hinge C and as shown in this figure part C would constitute a rib as it extends considerably from the surface of the sheets or strips.

Q. 30. Mr. Hunter, please examine Defendant's Horn Exhibit "F" and compare the same with the

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drawings and descriptive matter of the disclosure in the Villy Patent as to which you have just testified and state whether or not the said horn exhibit "F" conforms to the said Villy Patent?

A. The general construction of the Villy invention of his patent of 1903 is embodied in the Villy horn exhibit "F." There are some specific differences, however, in the manner of constructing the exhibit "F" over what is shown in the patent. These differences are more particularly in the following respects: In the Villy Patent the hinge between the several tapered strips is formed by a flexible fabric, whereas, in the particular horn exhibit "F," the hinge is formed by flanging the edges of the plates or strips and connecting them by wires to provide what we would call a piano-hinge construction. Furthermore, in the patent the several strips are first hinged together to form a sheet which may be folded in a zig-zag direction and when stretched out may be connected at its two free longitudinal [232] edges by suitable clips or interengaging parts to make the horn take the shape shown in Figs. 1 and 5 of the Villy Patent. In the horn "F" there is no line of detachment, except by withdrawing one of the wires, but as I understand the intention in the use of this horn, it is so arranged that the horn may be collapsed without disconnecting any of the hinged strips. If one of the hinge wires is withdrawn, then the strips will form a connected sheet similar to what is illustrated in Fig. 2 of the Villy Patent, that is, its arrangement before being set up. This is a minor

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difference which is incidental to the collapsible feature and is not at all material to the final shape or rigidity of the horn. The other difference I note, is that the horn "F" has an additional conical part for the small end which extends over the narrower ends of the strips to produce a clamping action as it were, between the inner and outer cone. This would be answered by what appears to be a second cone in Fig. 1 of the Villy Patent, and what appears to be the band q of Fig. 5 of the Villy Patent, though these bands are cones of shorter length than the outer cone of the horn "F," but in position and principle I would consider them the same. In the Villy Patent, this part q is not specifically described except in the language "by means of elastic or other connections q, arranged upon the horn end * * * " and which I understand to be a flexible band such as a tube of metal which will clamp itself upon or over the smaller end of the horn to hold it down upon the inner cone. The general construction, therefore, of this part q of the patent corresponds substantially to the outer conical tube of the horn "F," though differing in minor details.

Q. 31. Mr. Hunter, I hand you a printed copy of United States Reissued Letters Patent No. 12,442, reissued to G. H. Villy under date of January 30, 1906, for an Improved Horn, Phonographs, Ear [233] Trumpets, etc., and ask you to examine the said reissue letters patent and state whether the differences embodied in your last answer and equally so the similarities between the Villy Patent No. 739,954 and

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Defendant's Horn Exhibit "F" appear in the said reissue letters patent?

Mr. HILLIARD.—Objected to as immaterial.

A. I have examined the reissue letters patent referred to and am of the opinion that it is intended to illustrate identically the same construction which is found in the Villy Patent of 1903, and therefore it is, therefore my opinion that the differences set out in my last answer and equally so the similarities, between the Villy Patent 739,954 of 1903 and the Defendant's Horn Exhibit "F" equally appear in the said reissue letters patent No. 12,442 of 1906.

Q. 32. Please state whether in your opinion the horn exhibit "F" is any nearer an approach to the horn construction of the Villy Patent 739,954 than it is to the horn construction of the Villy reissue patent 12,442 of January 30, 1906?

Mr. HILLIARD.—Objected to as the question is leading.

A. No, it is not. It bears the same relation both to the original and reissue patents referred to.

Q. 33. I will ask you to examine the Nielsen Patent in suit and state whether you find in said patent the differences which you have set forth in your answer to question 30 as existing between the horn exhibit "F" and the Villy Patent 739,954, that is to say do you find embodied in the Nielsen Patent those differences which you have enumerated and set forth in your said answer to the question referred to?

A. No, I do not, because the differences which I

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have referred to between the horn "F" and the Villy Patent are details of construction which are not shown or disclosed in any manner in [234] the Nielsen Patent. In view of what I have before testified to, however, I desire to say that I have previously referred to the hinges of the Villy horn as forming ribs longitudinally of the horn structure, but I have also stated that those ribs were not the ribs which I find described in the Nielsen Patent.

Q. 34. Do you find in the Villy original patent, any foundation for treating the point of jointure between the sections composing the horn of said patent as ribs, and if so please point out from the specification such foundation?

A. Yes, I do, and in considering the Villy Patent in the previous answer I referred to this feature of rigidity which was had at the corresponding places where the ribs occur in the Nielsen Patent. In the Villy Patent, after describing how the tapered strips *b* were connected together and whereby in arranging the horn in the open position the rigidity was obtained, the patentee states:

"The angles formed by the meeting of the hinged segments when extended form, as it were, ribs, giving rigidity to the trumpet form."

(Page 1, line 64-67.)

and further

"My horn, owing to the curvature of the edges of the strip, is self-sustaining and requires no additional stiffening or sustaining devices

* * *." (Page 2, line 51-54.)

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Q. 35. In the horn exhibit "F" contains on the tubular sectional portions by which it is connected to a talking machine, the imprint Searchlight Horn Company, together with the picture of a lighthouse with the rays extended therefrom and the notation U. S. Pat. October 4, 1904, and January 30, 1906. Assuming October 4, 1904, to refer to the Nielsen Patent in suit and January 30, 1906 to refer to the Villy reissue patent to which your attention has been directed, I will ask you, with the two patents before you, to state what feature or features in common does there exist between exhibit Horn "F" and the horn of the Nielsen Patent in suit? [235]

Mr. HILLIARD.—Objected to as immaterial.

A. The Villy horn "F" corresponds to *the x* what is shown in the Nielsen Patent in the general shape of the tapered strips of which the body of the horn is composed. It also corresponds in that the cross-section of the body is polygonal in shape; that is to say, having the strips forming straight connecting portions approximating a circle and in which the straight portions connect at an angle. It also corresponds in the general longitudinal curvature of the horn which is due to the tapered shape of the strips making up the body of the horn. It differs in the details in respect to the particular manner of connecting the several sections or strips.

Q. 36. You have stated in your last answer in what respect Exhibit Horn "F" corresponds to the horn shown in the Nielsen Patent in suit, and I will ask you whether or not the said horn conforms to the

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horn in the Villy original patent in such manner?

A. Yes, it does.

Q. 37. And would your same answer hold true if the Villy reissue patent be substituted in the question for the Villy original patent?

A. Yes, my answer would be the same.

I offer in evidence on behalf of the defendant the Villy Reissue Patent No. 12,442 of January 30, 1906, the same being a reissue of original Villy Patent No. 739,964, and ask that the same be marked "Defendant's Exhibit Villy Reissue Patent."

Mr. HILLIARD.—Objected to as being immaterial.

Q. 38. Please examine the horn of the Villy Patent as disclosed as applied to a talking machine, and state to what extent it conforms in general appearance to the shape and configuration of the horn of the Nielsen Patent in suit? I have reference to the Villy original patent.

Mr. HILLIARD.—Objected to as immaterial.
[236]

A. The general shape and configuration of the Villy horn of the 1903 patent corresponds very closely to the shape and general appearance of the horn of the Nielsen Patent in suit. A comparison shows that the tapered strips in the Nielsen Patent are somewhat longer in proportion to the diameter of the horn than in the case of the horn of the Villy Patent, but this is immaterial, as the length of the horns vary to suit the fancy or desire of the manufacturer or user. There are no fixed rules as to the

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length of the horn. In both cases there is an un-ribbed or conical portion a^3 in the Nielsen Patent and 1 in the Villy Patent which corresponds as terminating at the beginning of the strips and in each there is a still smaller tubular section a^2 in the Nielsen Patent, and in the Villy Patent so that in the general structure the horns correspond very closely; to the eye they are both what may be termed morning-glory or flower effect horn.

Q. 39. Please state whether or not in your opinion the fact that the horn exhibit "F" is constructed of metal, differentiates the same from the invention disclosed by the original Villy Patent?

A. No, I do not, because it is a mere selection of material and because amplifying horns have been made and are being made of various materials, more especially of wood or metal as preferred. Some horns are of both wood and metal. The selection of material is merely a matter of opinion as to which is more suitable for the particular character of reproduction. In the cheaper machines metal horns were usually employed. In the [237] more elaborate and costly machines, wooden horns were adopted. At the present time, the wooden horns are largely superseding the use of metal. I do not consider that the selection of material would in any manner change the principle of the invention described in the Villy Patent, the restriction only being that whatever material is employed it shall be capable of being used in carrying out the principles of construction which are set out in the patent. That metal is

(Deposition of Rudolph M. Hunter.)

well suited for the purpose is clearly exemplified in the Defendant's Exhibit Horn "F" which I have been heretofore referring to as the Villy horn.

Q. 40. Mr. Hunter, I direct your attention to a publication of 1887 entitled "The Metal Worker Patern Book" and direct your attention more particularly to the descriptive matter beginning on page 221 at section numbered 603 and the illustration contained on page 222, and also the descriptive matter commencing on page 225, section 605, and to the illustrations and descriptive matter on page 226 and concluding on 227 at section 607, and ask you to examine the same and state the form of device you therein find disclosed to you.

Mr. HILLIARD.—Objected to *being* immaterial.

A. I have carefully examined the portion of the publication to which my attention has been directed and as specifically stated in the question, I find disclosed therein various examples of the manner of making tapered horns or cornucopias of various shapes. On page 222 the cornucopia not only is tapering with a very pronounced bell, but the longitudinal axis of the same is of a sinuous character, thereby making it one which is difficult to construct. The plans which are illustrated in the diagram are for the purpose of educating a mechanic how to cut the sheets of metal which, when placed together, will provide a cornucopia of the particular shape which shall be formed of longitudinal strips tapering from one end to the other and [238] forming in cross-section a polygonal structure having eight

(Deposition of Rudolph M. Hunter.)

sides. The construction which is there shown and carefully laid out is a cornucopia or tapering horn which has all of the essential characteristics of an amplifying horn suitable for reproduction of sound, and also having the general characteristic of the horn of the Nielsen Patent in suit except that it does not describe the specific outward flanges which are to form the ribs. The construction shown illustrates the tapered strips as being abutted together at the angle desired to form the octagonal cross-section. The particular tapering character of the strips may be readily grasped from an examination of the diagrams which are shown as grouped about the central figure. If we were to use a plurality of strips conforming to the particular diagrams shown at the upper part of Fig. 512, we would obtain the identical general shape of horn shown in the Nielsen Patent. In the tapered horn illustrated in the particular design shown in the publication, the longitudinal tapered strips are purposely laid out with somewhat varying configuration so that when assembled, they will not only produce the tapered form of the general character of the horn in the Nielsen Patent, but will provide a horn with a sinuous axis, this latter merely being a difficult feature of accomplishment and therefore being specially given by way of example. The same evidences which are found in the illustration and description as to how to construct such tapering horn may readily be followed by any one skilled in the art to make a straight

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tapered horn or one of any other general alinement as to its axis.

In respect to the horn illustrated on page 226 under Fig. 516, I find that it illustrates a tapered horn of octagonal cross-section and having a longitudinal axis of curved character. The general construction of this horn is somewhat similar to the horn before referred to as found on page 222, but the bell construction or large end of the horn is different in that in the present case there is [239] no special outward flaring to provide a pronounced bell. The longitudinal strips the side surfaces of the horn are tapered from one end to the other and their general shapes are indicated in Figs. 518 to 520 inclusive, two of them being straight and the remaining ones curved. The particular taper of the horn here illustrated is not as full as illustrated in the Nielsen Patent, but that is merely a matter of design and with the illustration or example given in the publication the extent of taper may be anything which the designer wishes to produce. He may make one end smaller than the other to any degree and he may make the bell mouth end flare to a greater degree without having to provide anything but what is fully explained in this publication. The particular provision for an extended bell mouth is also shown in the layout under Fig. 512 and the principles there shown may be readily applied by any one skilled in the art in extending the particular shape which is shown by way of example in Fig. 516 of the same publication.

(Deposition of Rudolph M. Hunter.)

Q. 41. Mr. Hunter, in view of the illustration of the curved tapering horn octagonal in section illustrated on page 226 of the publication to which your attention has been directed, together with the descriptive matter directing one how to lay out the patterns for the horn, what problem of a mechanical standpoint would be presented to a mechanic in uniting the laid-out sections in the building up of the completed curved tapering horn?

A. There would be no special problem, as he would adopt the manner of uniting the sections which he found most convenient, or which was most easy of accomplishment by the tools at his command. There are various manners of forming joints between sections of sheet metal and these are either by inter-engaging seams, flanging the metal and soldering the flanges, or arranging along the line of the seams, strips of metal to which the specially cut strips are soldered, thereby not only joining the strips but also reinforcing [240] the joints. There would be no problem except what any ordinary tin worker or sheet worker would be capable of instantly solving by his knowledge, which would be ordinary mechanical skill.

Q. 42. Were the various forms of joint or seam unions for uniting metal sections specified by you in your last answer known to you in connection with the metal art at the date of the publication which you have been testifying regarding, the same being the year 1887?

A. Yes, and for the last forty years.

(Deposition of Rudolph M. Hunter.)

I offer the publication in evidence and ask that the same be marked "Defendant's Exhibit Pattern Book."

Adjourned to 10 o'clock, Wednesday morning.

Philadelphia, July 1, 1914.

Met pursuant to adjournment.

Present: Same as before.

Q. 43. Mr. Hunter, Please examine claim 3 of the Nielsen Patent in suit, and state whether or not you find any provision in said claim as to the strips of which the horn is formed being composed of metal.

A. I have carefully re-read the claim referred to in your question and I find that there is nothing in the claim which provides that the horn is to be made of metal.

Direct examination closed.

(By Mr. HILLIARD.)

XQ. 44. Mr. Hunter, by whom are you immediately retained to testify in this suit?

A. That question did not come up. I was requested to take up this matter with Mr. Acker counsel for defendant whom I met for the first time a few days ago. I presume that the matter was brought to my attention on account of the manufacture and sale of horns of the talking machine of the Victor type being involved. [241]

I was about to go on my vacation and I took this matter up hurriedly and there had been no discussions regarding retainer in the matter.

XQ. 45. By the expression "horns of the Victor type being involved" do you mean horns made by

(Deposition of Rudolph M. Hunter.)

the Victor Talking Machine Co.?

By Mr. ACKER.—The question is objected to on the ground that it has not been shown or proven that this witness has any knowledge as to any horns having been manufactured by the Victor Co.

A. All I know regarding that matter is that horns of the character of horns “B” and “C” which I have before referred to in my testimony, are types of horns which have been sold by the Victor Co. and I understood that horns of this type was involved in this suit.

XQ. 46. Who first approached you on the matter of testifying in this suit?

A. Mr. Frederick A. Blount of Mr. Horace Pettit’s office asked me to meet Mr. Acker in respect to the possibility of his desiring some testimony from me in respect to the matters involved in the present suit.

XQ. 47. Do you know whether or not any relation of any kind exists between Mr. Blount and the Victor Talking Machine Co.?

By Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent and on the further ground of not being proper cross-examination.

A. I do not. I only know that Mr. Blount is an attorney-at-law in Mr. Pettit’s office and that Mr. Pettit has acted as counsel in patent matters for the Victor Talking Machine Co.

XQ. 48. Will you please state to what extent, if any, you have in the past rendered services to the

(Deposition of Rudolph M. Hunter.)

Victor Talking Machine Co. in relation to the patents or inventions having to do with talking machines or parts?

Mr. ACKER.—The question is objected to as being immaterial, [242] irrelevant and incompetent and on the further ground that it is not proper cross-examination, and on the further ground as calling for testimony which is in no manner connected with or bearing on any of the issues involved in the present controversy.

A. I have acted both for and against the interest of the Victor Talking Machine Co. for approximately fifteen years. I have, in expert capacity, acted in the interests of the Victor Talking Machine Co. in nearly all of its litigation relating to inventions, but I have also had frequent occasions to act for others against the Victor Co. in special matters, but in these litigated matters there was no immediate conflict I merely wish to bring out the fact that I was not exclusively acting for the Victor Talking Machine Co. in the talking-machine art taken as a whole.

XQ. 49. With whom or what party does your contract to testify in this case exist?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent.

A. The matter came up so suddenly, as I before explained, on account of the possibility of my going out of the country on my vacation, that I took up the matter without any discussion as to any contract or agreement in respect to my testimony.

(Deposition of Rudolph M. Hunter.)

XQ. 50. By whom or what party do you expect to be paid for your service for testifying in this case?

Mr. ACKER.—Same objection as to the previous question.

A. The question of recompense has not even been touched upon.

XQ. 51. Is it customary with you to appear and testify as an expert in patent suits without knowing by whom you are to be employed?

Mr. ACKER.—Same objection as to the previous question. At this time I desire to direct the Court's attention to the needless encumbering of the record with a line of examination which is so apparent is not proper cross-examination in any sense of the word. The Court will undoubtedly take recognition of the [243] fact that the present expert witness will expect compensation for his services and doubtless in entering into the case without a pre-arrangement for compensation he took into consideration the standing of the parties who approached him on the subject.

A. I frequently have taken up the matter of giving expert testimony in cases in which the time was limited and in which there was no discussion of any kind as to whom paid the bills I am usually satisfied in knowing the responsibility of the parties for whom I am acting; and as for charges, I do not discuss the extent of them, as I make my charges to suit what I consider they should be irrespective of the time consumed.

Complainant's counsel states at this point that he

(Deposition of Rudolph M. Hunter.)

does not consider the mere fact of this witness being paid for his services to be otherwise than perfectly regular and proper.

XQ. 52. Can you state whether or not the principal by whom your services are engaged is the defendant, Sherman, Clay & Co.?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent and on the further ground that of it not being proper cross-examination and on the further ground that the witness has stated on cross-examination that he took the matter up with counsel for defendant in the present suit without discussing one way or the other as to the parties to the suit.

Mr. HILLIARD.—The witness has also stated that he took the matter up with Mr. Blount of the office of Mr. Pettit who is counsel for the Victor Talking Machine Co.

Mr. ACKER.—Replying to the latter portion of Mr. Hilliard's statement that Mr. Pettit was the attorney for the Victor Talking Machine Co., I request the witness to read his answer to XQ. 47 previous to answering the last question.

A. When I took this matter up with Mr. Acker, I did not know who the complainant was nor who the defendant was, and was not interested as to the parties but was only thinking of the subject; that [244] is, the matters which would require expert evidence. In fact I made my experiments and tests and gave my direct evidence in part before I actually had the names of the complainant and defend-

(Deposition of Rudolph M. Hunter.)

ant. I was introduced to Mr. Acker by Mr. Blount and that was sufficient for me to proceed with Mr. Acker in respect to the matters involved in this suit, and I took up the matter with Mr. Acker without further discussion except the questions directly involved. I did not say that Mr. Pettit is counsel or attorney in anything connected with this suit, and I have no knowledge that he has any connection with it. He did know that I was familiar with the talking-machine art and scientific questions which would be involved therein and it was only natural that he should bring me in touch with Mr. Acker.

XQ. 53. Have you ever in the past been retained as expert in patent matters by the Edison Phonograph Co.?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent. Counsel realizes that all that he can do at this time is to protest against a line of examination wholly outside and going way beyond any of the interests involved in the present controversy and in a line clearly not cross-examination. I again direct the Court's attention to the manner in which the present cross-examination is being proceeded with and enter a strong protest at this time against the fishing expedition being now proceeded with by counsel for complainant as to securing from this witness in some manner or another evidence to be used in all probability against parties other than the party defendant to the present action.

A. No, I have not.

(Deposition of Rudolph M. Hunter.)

XQ. 54. And the same question as to the Columbia Talking Machine Co.?

Mr. ACKER.—The same objection and statement as to the previous question. [245]

A. No, I have never been retained by the Columbia Phonograph Co.

XQ. 55. Do you consider yourself to be an expert in the construction of patents?

A. I presume by construction you mean the drafting of the specification and claims, keeping in mind the proper legal interpretation to be given to the language so employed. With that understanding, I would say that my long experience as well as various extensive experience in every branch of patent matters would qualify me in that capacity.

XQ. 56. By construction of patents, I referred to the interpretation of issued patents with a view to determining from their language the construction of the devices described in them and the mechanisms or devices, included within the scope of their claims?

A. The same qualifications which I referred to in my answer to cross-question 55 qualifies me to say that I am an expert in respect to capacity to interpret the language of specifications and claims of issued patents as to their scope and meaning, not only in respect to what is clearly illustrated and specifically defined in the patent, but also in respect to equivalency within the meaning of the terms of the claims.

XQ. 57. In your answer to question 7 you state that in your opinion the statements contained in the

(Deposition of Rudolph M. Hunter.)

patents as to the results to be secured by the constructions therein described and claimed is not warranted by the fact and that the result alleged to be accomplished are in fact not accomplished. I wish you would state what "results alleged to be accomplished are, as you understand them to be from the patent"?

A. The patentee states that the object of his invention—

"is to provide a horn for machines of this class which will do away with the mechanical, vibratory, and metallic sounds usually produced in the operation of such machines, and also produce a full, even, and continuous volume of sound in which the articulation is clear, full, and distinct." [246]

and in further discussing the construction of the horn which embodies the elements to be claimed, he sums up,

"it is the longitudinal ribs b^2 which contribute mostly to the successful operation of the horn, said ribs serving to do away with the vibratory character of horns of this class as usually made and doing away with the metallic sound produced in the operation thereof."

The intent and purpose of the patent is to provide a construction of amplifying horn which will do away with the vibratory character incident to horns as usually constructed, and my testimony was to the effect that this was not possible of accomplishment

(Deposition of Rudolph M. Hunter.)

by any construction such as disclosed in the Nielsen Patent.

XQ. 58. Is your interpretation of the patent that its object and purpose is to eliminate vibration in phonograph horns existing at the date of this patent and prior thereto?

A. Naturally the patent is speaking of "horns of this class as usually made" must have referred to horns existing at and prior to the date of the application of the patent. In regard to "eliminating" the vibrations I do not find that word in the specification, but I do find that the patentee states that his object is to provide a horn "which will do away with the "mechanical, vibratory, and metallic sounds usually produced" and again that the ribs which he employs "serve to do away with the vibratory character of horns of this class as usually made" and the ordinary interpretation of that language would justify the assumption of the elimination of the said vibration.

XQ. 59. Do you consider that elimination of vibration is essential to do away with the mechanical, vibratory and metallic sound usually produced in phonograph horns? I will refer you to the phraseology of the patent contained in lines 11 to 19 inclusive.

A. The language of the specification, if closely analyzed, is very vague and inconsistent with what actually and does necessarily [247] take place in any amplifying horn. The language distinctly says that the horn "will do away with * * * vibratory * * * sound usually produced in the opera-

(Deposition of Rudolph M. Hunter.)

tion of such machines" and this is an utter impossibility, for it is not possible to prevent vibrations in any horn in which sound impulses are transmitted through it. I have before pointed out that so far as mechanical or metallic sounds, so called, are to be considered, these are due almost exclusively to the recording, and not to the reproducing instrument, which employs the amplifying horn. The patentee evidently had some idea that by ribbing the horn he could stop its vibration and I read his specification as if that was his object.

XQ. 60. Disregarding the specification of the patent, do you consider that for the purpose of doing away with the mechanical, vibratory and metallic sounds usually produced in the operation of phonograph horns at the date of this patent and prior thereto, elimination of vibration was necessary?

A. I must take exception to your assumption contained in the question. You overlook the fact, evidently, that I have stated that the so-called mechanical and metallic sounds being due to the reproducing or amplifying-horn is largely a matter of imagination. Of course, if we are to consider the word "vibratory" sounds, which are broadly included in your question, then it is self-evident fact that if we are to stop vibratory sounds in the horn we must eliminate the vibrations in the horn.

XQ. 61. Do you consider that the object of this patent was to eliminate all vibratory sounds?

A. That is what the language of the patent states, and I can only assume that that is what the patentee

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evidently desired. Even if he did not expect to eliminate all of the vibrations, because I have stated that that was an impossibility, a liberal interpretation of the language of the patent to imply that the inventor only [248] contemplated the elimination of the greater part of the vibrations, still leaves the language and the disclosure in the patent as a misstatement of what actually does and must take place in any construction such as disclosed in that patent.

XQ. 62. Will you describe what you understand is meant by the term mechanical, vibratory and metallic sound?

Mr. ACKER.—Question is objected to as being immaterial, irrelevant and incompetent unless the question be confined to the witness' understanding of the expression referred to as derived from the specification of the patent in suit.

Mr. HILLIARD.—I will confine the question to those limits, and ask the witness to answer with that understanding.

A. Understanding those words "mechanical, vibratory and metallic" in the sense which they can only have when applied to the reproduction of sound, I will say that the mechanical sounds are those which are impressed upon the sonorous sound waves in the body of air within the horn by the mechanism of the reproducer, such as the scratching of the stylus upon the sound record, in addition to such corresponding sounds as would be produced by the record itself where mechanical sounds had been recorded at the time of making the record. By me-

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tallic sounds I understand to be the reproducing of the recorded metallic sounds which have undesirably, for the reasons already testified to, been impressed upon the sound record, and which must necessarily be reproduced through the sound box and the sonorous body of air of the amplifying horn. By the word "vibratory" as applied to sound, I can simply include all vibrations, for it has no other meaning and, of course, to interpret that word in that manner would be to eliminate all sound. In any event, neither the mechanical nor the vibratory sounds upon which the music depends, nor the metallic sounds are, or can be, eliminated by the amplifying horn or any mechanical construction thereof. It is an utter impossibility to do so, because they do not arise in the horn and no [249] change of the horn can eliminate them. They are reproduced in the sonorous body of air within the horn and this is independent of the particular mechanical construction of the horn itself other than that the horn is the boundary of such sonorous body of air.

XQ. 63. In answering your last question, did you have in mind that the term mechanical, vibratory and metallic sound is qualified by the phrase "usually produced in the operation of such machines"?

A. Yes, but I have taken the word produced as meaning reproduced, as these machines are reproducing machines. I have very clearly and repeatedly stated that the mechanical and metallic sounds are not produced in the horn, they are merely reproduced in amplified form by the presence of the sonorous

(Deposition of Rudolph M. Hunter.)

body of air within the horn.

XQ. 64. Do I correctly understand that in your answers to the last two questions, you have defined your interpretation of the expression in the patent "mechanical, vibratory, and metallic sound usually produced in the operation of such machines"?

A. You are to understand that I am analyzing the statement which I find in the patent and applying it to what actually does take place, and I am merely stating my understanding of what takes place and have indicated that this was evidently contrary to what the patentee was trying to say. In other words, if his language was intended to mean that the amplifying horn through its metallic structure produced the mechanical, vibratory and metallic sound, he is in error, but that such sounds are produced is a fact, but they are not produced by the construction of the amplifying horn and his construction of that horn does not eliminate them by preventing them from being produced.

Adjourned until Thursday, at 10 A. M. [250]

Philadelphia, July 2, 1915.

Met pursuant to adjournment.

Present: Same as before.

Cross-examination Continued.

XQ. 65. In your comparative tests of the horns "A" and "B," what were you trying to determine?

A. I was trying to determine what, if any, were the differences in the results of the different horns. The difference in construction is self-apparent. If there was any differences in results in the operation

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of the horns that could be determined only by tests, and it was with this object in view that I made the tests.

XQ. 66. Cannot you state a little more specifically just what results you were endeavoring to determine in your comparative tests of the horns "A" and "B"?

A. I was endeavoring to determine what difference the use of these two horns would make upon the reproduced sounds as they would be delivered to the ear of a person standing in front of them and at the same time, in the making of those tests I kept in mind the language of the Nielsen Patent, in suit, with the special object of determining the correctness or incorrectness of the statements contained in the patent in respect to the results claimed to be accomplished by the construction of the horn described and claimed in the Nielsen Patent in suit.

XQ. 67. Through what physical effect did you endeavor to determine the difference that the use of the two horns "A" and "B" would make upon the reproduced sound?

A. The physical effect upon the ear, both directly when standing in front of the horns during the reproduction of speech and music of various characters similarly produced from each of the horns [251] and on the same machine and with the same sound-box and also when exploring the vibration of the metal surfaces of the horns during reproduction of this speech and music, to compare the vibratory action which is set up in the horns and which cannot

(Deposition of Rudolph M. Hunter.)

be seen directly, but which can be determined by the use of a suitable microphone device such as I have explained in my former testimony.

XQ. 68. What elements of the vibratory action did you determine by the tests which you followed?

A. I do not understand just what you mean by your question.

XQ. 69. Would you determine by your tests the amplitude of the vibrations by any absolute standard?

A. No, as I did not consider that was at all necessary. The positiveness of vibration or the lack of them, all of which would be due to their amplitude, would be readily determined by the use of the microphone, but would depend upon the ear to approximate the difference.

XQ. 70. What equality of conditions did you deem necessary in order to make a fair comparison of the horns "A" and "B" for your purposes?

A. As various records produce entirely different effects upon the ear when reproduced from the same horn, it was manifest that in making any comparisons between the results of the use of the two horns, it was necessary to use the same record under the same conditions except as to the change of the horns. In view of the fact that the horns were not of the same exact shape, the only proper test to determine their results with respect to the question of vibration by the natural hearing operation, would be for the person to stand at various distances in front of the horns. Of course, it would not be a proper test

(Deposition of Rudolph M. Hunter.)

in horns which differ in general shape to stand back of the horn or to the side of the horn when relying solely upon the ear unassisted. The [252] reason of this is that the general length and diameters of the horns, of whatever character they may be, always more or less affect the lateral vibrations and, therefore, the true results of the horns cannot be determined excepting when the hearer is in front of the horn where the sound waves, which are set up in the body of air within the horn, are enabled to direct themselves upon the air body between the bell outlet of the horn and the person standing in front of the horn. In respect to the other questions, as to the places of vibration in the horn or the extent of such vibrations, this is determined mechanically, through the microphone without any special interest in the beauty of the reproduction; and in making these latter tests, it is immaterial where the person stands. In making these various tests I did so with the horns in their natural open condition and also with various degrees of dampening by introducing handkerchiefs, for the purpose of deadening the external sounds in the general atmosphere while leaving, more or less pronounced, the mechanical vibrations in the horn structure itself. I subjected the various horns to similar tests. I do not consider that the mere general shape of the horns have any governing effect so far as inventions is concerned because, whether horns are long or short or relatively abrupt or not in their taper is a mere matter of fancy or convenience in manufacture. All shapes of horns have heretofore

(Deposition of Rudolph M. Hunter.)

been made and the general shape of the horn of exhibit "B" as well as the exhibit "A" are both old and well-known types. The continuous flare as in "Horn B" is common to all brass instruments, such as the French horn, for example, and that it is built up in sections is merely a matter of convenience for cheap construction; and moreover, as I have pointed out in the prior art the building up of a flaring horn of this character by gradually tapered sections or strips connected side by side was old and well known, for example, in the exhibit, "The Metal Worker Pattern [253] Book," on page 222, wherein is shown not only this gradual flaring curvature, but in addition, curvature in the direction of the axis of the horn, this being merely one example of the prior art which has been known to me in sheet-metal working well prior to 1900, this particular book having been known and examined by me long prior to that date.

XQ. 71. In order to make a fair comparative test between the horns "A" and "B" for the purposes for which you did make the tests you have testified about, what similarity in condition should be present; that is to say, for instance, as to the material of which the horns are constructed, its quality, thickness, the nature of the music played, and so forth. Of course this question does not take into consideration the shapes of the respective horns or the configuration of the parts of which they are constructed, which you may assume are essential points of difference in the light of the patent in suit?

Mr. ACKER.—The latter part of the question is

(Deposition of Rudolph M. Hunter.)

objected to as requiring the witness to assume something as being essentially different, and thereby restricting the witness to an answer not in accordance with the conditions existing in the making of the tests referred to in his testimony.

Mr. HILLIARD.—The witness has testified that he has made comparative tests of the two horns “A” and “B” for the purpose of determining certain results which he has stated. The point of my question is to determine what similarity or equality of condition must be present in the tests in order to insure results which will bring out the relative merits of the two horns insofar as they may vary in respect to the structural differences between them. The horns are obviously of different construction and equality of condition obviously does not exist in respect to their configuration, and the shape of the parts composing them [254] and the method by which they are joined together.

A. For the purposes of this testing and to guard against possible doubt in the results, I was careful to have the surface area of the two horns as nearly identical as it was possible to make them, and I have no reason to doubt that they differ in any material respect to this question of area. In the next place, the tin employed in the two horns may be assumed as being identical as to thickness, but it is manifest that the bell end of the horn “A” is of brass and not of tin, and this was employed because it was very difficult to make a bell of tin of one continuous piece in the short time which was allowed to me to have the

(Deposition of Rudolph M. Hunter.)

tests made. I have not considered that this difference in the use of brass for the bell horn "A" is a very material one, because it is of metal and so far as the advantages or disadvantages of the construction under consideration is concerned, the matter of the metallic vibration would be present in the case of brass just about as much as they would be present in the case of tin. The endeavor has been to make the two horns to conform mechanically to what would be the reasonable requirement for the purposes of the test, as was possible under the circumstances. In the case of the horns "D" and "E," the outward configurations were the same except for the presence of the ribs in the one and the omission of the ribs in the other, so that this difference in shape of the horns does not come into the test between those two horns "D" and "E."

XQ. 72. Have you named all the conditions which should be common to both horns to enable you to make a fair test of the two constructions embodied in the horns "A" and "B"?

A. To answer you more specifically upon this particular point, I will say no, because the horn "A" has not been made to produce a shape which would correspond more fully to the general shape of the horn "B"; that is to say, if I have had the time I would have [255] made an additional horn of the general construction of horn "A" which would have been more approximately the total length of the horn "B" and with a diameter at the bell end approximating to the diameter of the bell of horn "B."

(Deposition of Rudolph M. Hunter.)

As it was, I was using the particular size of bell available and making the sheet-metal conical tube sufficiently long to make up the additional area of metal necessary to correspond to the area of metal in the horn "B." The mere lengths and diameters of the horns are purely a matter of fancy with the manufacturer. At one time the idea was to get as big a horns as possible, to make a loud noise, but later, the tendency was to condense the apparatus and make the horn as small as possible, so as not to have it objectionable to the eye and to make it convenient in handling, and in this way the horns became shorter and of larger diameter at the open end. So much has this tendency to minimize the size of the horn or amplifier taken place, that in the more modern machines the horns are wholly concealed and are merely built into the cabinet or case containing the motor and other mechanism.

XQ. 73. Have you now named all conditions which should be present for the purpose of determining the relative merits of the two constructions embodied in the horns "A" and "B," respectively?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent. The witness has testified that he made his tests between a horn heretofore put on the market by the defendant and claimed to be an infringement of the Nielsen Patent and a horn of the prior art which existed prior to the date of the Nielsen Patent and known to the trade as the B. & G. horn, the purpose of the tests being to determine whether the construction and formation

(Deposition of Rudolph M. Hunter.)

of the defendant's horn produced a better and purer amplification of the reproduced recorded sound of the talking machine over those produced by the horns of the prior art and as contended for by the patentee of the letters patent in suit. In making this test he [256] is not called upon to provide any conditions other than those present and inherent in the horns themselves as placed on the market.

Mr. HILLIARD.—The witness may have testified to that, but he certainly has testified that he made a comparative test of these identical horns "A" and "B" now before him for the purpose of determining the relative merits of the respective constructions, and he has stated the results of that test. I wish to find out the conditions under which he made the tests and what conditions he deemed necessary should be common to the test of each horn for the purpose of determining the correctness of the results which he stated.

By relative merits I mean the relative merits in respect to the purposes for which he was making the test.

A. I believe I have named all the conditions which should be present for the purposes of the comparative tests made as between these two shapes or designs of horns "A" and "B" both representing conventional designs employed on the market in reproducing machines. As I before stated, I did not feel justified in changing the proportions of the horn "A" as to its diameter and length to correspond to the diameter and length of the horn "B" as I wished

(Deposition of Rudolph M. Hunter.)

to maintain the substantial proportion of the horn "A" to correspond to the B. & G. horns as found on the market. It is also to be kept in mind that my tests were not designed with a view of determining whether one horn made a louder sound than the other, that is, amplified more than the other, as that is a matter of no consequence, but the test was with a view of determining whether the purity of reproduction was better or poorer in the case of one horn than the other and also to determine the nature of the vibrations or as to their elimination in case of the two designs of horns then subjected to the same conditions, that is reproducing from the same record with the same sound-box and with the same machine.

[257]

XQ. 74. In making your tests of the horns "A" and "B" you depended solely upon your ability to carry the impressions from one to the other in your mind, did you not?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent, inasmuch as it is only by the carrying in the mind that the users of horns of the type referred to are enabled to distinguish differences and the horn for amplifying purposes are addressed to the users thereof.

Mr. HILLIARD.—You have heard the statement of defendant's counsel, Mr. Hunter, is it correct?

Mr. ACKER.—Objected to as immaterial, irrelevant and incompetent.

A. I heard the objection, but it was only expressing what was to be my answer to your question, omit-

(Deposition of Rudolph M. Hunter.)

ting, however, the statement that the question was immaterial, irrelevant and incompetent as such characterizations would be out of my province. I might add, that the reproduction of sound so far as talking machines are concerned, can only be considered good or bad, pure or imperfect according to the training of the ear of the hearer, and therefore, naturally I depended solely upon the impression which I received through the ear. I, however, made a very large number of tests and I made the changes from one horn to the other with great rapidity and with concentration of my hearing upon certain definite reproductions from the record so as not to confuse the impressions which I received. Of course, this is also in addition to the reproductions from the whole record which I also made, the latter being to enable me to select special parts of each record upon which to make the more concise tests.

XQ. 75. In comparing the extent of the vibrations of the two horns, you depended solely upon your ability to carry the impressions from one to the other in your mind, did you not?

Mr. ACKER.—The question is objected to as immaterial, irrelevant [258] and incompetent and on the further ground that this witness has repeatedly stated that he employed a microphone in connection with determining the vibrations of the horn.

A. It was, of course, necessary for me to carry the impressions received in testing one horn during the short interval of changing the horn and reproducing the same sounds to give me the impression of the

(Deposition of Rudolph M. Hunter.)

reproduction of the horn to be compared. I, of course, could not listen to the two horns at the same instant. This statement applies both to the tests made with and without the microphone.

XQ. 76. In your answer to question 12, page 21, you say that as between the horns "A" and "B" it is your opinion that the horn "A" had less vibration than the horn "B." Will you state what you mean by "less vibration"? That is as to whether you refer to amplitude of vibration, extent of surface vibrated or otherwise?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent unless the question is confined to the vibration as set forth and referred to in the patent in suit.

Mr. HILLIARD.—I am merely asking the witness to state what he meant by an expression which he used. He can state by reference to the patent or otherwise so long as he states what he meant by the expression.

A. I was referring to the amplitude of vibration, that is, the violence of vibration and was not concerned with the fine vibrations of small amplitude.

XQ. 77. Can you indicate by chart or sketch the position of the nodal lines in the horn "A"? If you can do so I will ask you to assume any normal conditions that you desire.

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent.

A. I do not think that any definite diagram could be made because the nodal lines or places of relatively

(Deposition of Rudolph M. Hunter.)

nonvibration will change with every material change in the nature of the sound being [259] amplified and also with the changes in the intensity of the sound. The general nodal lines which may be considered as being more pronounced in the vibration of the horns, will be in the direction of the length and they will increase in the case of a horn like the horn "A" in the width of the surface between any two seams. This can better be understood if we consider a violin string stretched across a bridge which establishes one nodal point in addition to the two ends of the string providing two other nodal points. In the vibration of that string, the length between the bridge and the short length of the string on the one side of the bridge determines the maximum length of the distance between what would be the nodes on the long end of the string where the long end was exactly a multiple of the length of the short end. There would therefore be a number of nodes in the vibration of that string. By shortening the length of the long end of the strings by the fingers, as is common in playing the violin, for example, the subdivision of the string as to the position of the nodes increases and consequently the position of the nodes vary with the different sounds emitted. In the vibration of plates or surfaces, the same change in the position of the nodes take place with respect to the width and length of the plate, but in this case the intensity of the sound causes the shifting of the nodes instead of the violence of the vibration of the strings by the bow. As the amplifying horn is subjected to

(Deposition of Rudolph M. Hunter.)

all the varying conditions of sound produced by the sound-box and record, it is manifest that there is ever a constant shifting of these nodal points. It would not be possible to make an actual diagram to illustrate these conditions.

XQ. 78. Could you make a diagram which would show such conditions with a sufficient degree of accuracy for the purpose of making a comparison between the horns "A" and "B"?

A. Just at the moment I am not sure that that can be done, but I [260] will take the matter under consideration and state a little later whether I think I could make such a diagram.

XQ. 79. Is it not true that a rigid surface in a plate of uniform thickness establishes a node in that plate?

A. That is true if you mean by a rigid surface as a part of the surface which is positively held against vibration as if it were clamped. Any plate at the point where it is claimed and rigidly held, as in a vise, determines a node at that point.

XQ. 80. Are you familiar with the number and extent of the experiments, if any, made in the phonograph art for the purpose of producing a satisfactory amplifying horn, prior to the date of this patent?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent and on the further ground that it assumes that a satisfactory amplifying horn had not been in use in the art connected with talking machines prior to the date of the letters patent in suit, and which assumption is unwarranted

(Deposition of Rudolph M. Hunter.)

by anything contained in the record herein.

Mr. HILLIARD.—Question withdrawn.

XQ. 81. Will you state from your experience and knowledge of the phonographic art, whether or not experiments had been made prior to the date of this patent for the purpose of producing amplifying horns?

Mr. ACKER.—Objected to as immaterial, irrelevant and incompetent.

A. Yes, experiments were made when the tendency was to have enormously large horns in which the size and weight were mechanically objectionable. Various changes were made in the construction of the machine to eliminate the objectionable weight upon the sound-box and stylus which interfered with the reproduction, and also these experiments and improvements were to enable the horn to be [261] adjusted irrespective of the movements of the sound-box so that the horn could be directed to throw the sound into different directions in the room without having to turn the whole instrument. Aside from these experiments, there were various experiments made to simplify the construction of the horn and to give it ornamental shape and also to proportionate it to give the desired amplification with a reasonably short length. There were also some experiments made in employing combination horn structures where one part would be sustained upon a tripod while the short portion would be a direct part of the machine in connection with the sound-box. There has also been improvements made in the construction

(Deposition of Rudolph M. Hunter.)

of the concealed wooden horn which involved mechanical requirements. However, in most of the horns the question of reproduction was only a secondary matter to that of construction, as it was generally understood that any tubular structure which had a flare would contain a sonorous body of air that would amplify. It is my opinion that very few persons in the talking-machine art have understood the real requirements of producing records for reproduction and that they frequently attribute to the amplifying horn, defects which are not due to it at all, as I have before pointed out.

XQ. 82. I call your attention to a book entitled "A Complete Manual of the Edison Phonograph" by George E. Tewksbury, from which I read the following on page 71:

"With the phonograph a speaking tube and listening tube are provided. The speaking tube for dictation purposes meets the conditions acceptably. The single tube for listening is the best device for the purpose. But for concert use and public entertainment, the sound must be thrown out so that many persons can hear it, and for this purpose numerous types of amplifying horns have been produced. It would astonish the casual reader to learn of the number and thoroughness of the experiments in that direction. Mr. Edison has himself tried a vast number of sizes and shapes, out of all sorts of material. Other experimentalists and enthusiasts have gone over the same ground, and

(Deposition of Rudolph M. Hunter.)

branched out into new paths. Yet all have come back to the main-travelled road. Wood, iron, steel, zinc, copper, brass, tin, aluminum, cornet metal, german silver, have been tried. Glass, too, and hard rubber, paper-maché, and probably every other product that nature yields or man contrives." [262]

and I ask you whether or not you agree with the statements contained in the portion read, assuming that they refer to the condition of the phonograph art in the year 1897 and prior thereto. Of course, I do not ask you whether or not it would "astonish the casual reader to learn of the number and thoroughness of the experiments" or as to whether other conclusions of that nature are true. You may have the book for examination.

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent and on the further ground that it is not proper cross-examination, and I take occasion to caution counsel that if he pursues his examination relative to this so-called publication, he makes the witness his own and becomes bound by the answers given.

Complainant's counsel states that he is merely submitting to the witness a statement of fact relative to conditions concerning which the witness has testified and does not at present, at least, undertake to prove the correctness of the statement by the book itself.

A. Before answering your question, as you have only quoted an extract from the whole chapter, and as I do not recognize the book as one familiar to me,

(Deposition of Rudolph M. Hunter.)

I prefer to read the whole paragraph before I can testify.

Adjourned until 2 P. M.

Met after recess.

The WITNESS.—(Continuing.) While I have no reason to criticise the statements as being the understanding of Mr. Tewsbury, the author of the book, I do not agree that this statement which you have quoted to me is one which properly defines the condition in respect to amplifying horns which are involved in the present suit; and therefore the quotation is apt to be misleading if not fully understood as to its real intent and purport herein. The character of the machine to which [263] that quotation applies is the phonograph of Edison in which the same instrument records and reproduces and the problem which Mr. Edison had was to find some convenient small horn which would both answer for recording and reproducing or amplifying. As is evident from the article, difficulty was had in finding a common ground as to construction between the recording and amplifying horn and this confirms what I have so frequently said in this testimony that the problems are entirely different, the recording being in effect a closed horn or tube while the reproducer or amplifying horn is an open tube. Furthermore, they are required to operate in connection with sounds produced under different conditions. I have before stated that no horn which is used for recording is suitable for reproducing. Furthermore, I do not agree with the

(Deposition of Rudolph M. Hunter.)

final statement of the paragraph you quoted from, which reads as follows:

“Any horn to be good must come out of sound metal, and be perfectly joined. Ordinary joining will not do, and imperfect metal is a delusion.”

The reason that I do not agree with this is that in the light of experience of 17 years after that publication appeared, manufacturers of talking machines have largely discarded the use of metal in the horns and are employing wood. I do agree, however, with the statement that if metal is employed the seams would be perfectly joined. The article from which you quoted applies solely to the experimental work in Edison's laboratory designed to accomplish a certain special result which does not pertain to ordinary talking machines as found on the market, as these are solely for reproducing and not for recording. I would further call attention to the fact that the illustration, facing page 71, from which your quotation is made, illustrates *recording* horns as of that date, 1897 and prior, and, therefore, is not to be considered as a full exemplification of what might be employed under the constructions [264] of said date in respect to amplifying horns. I note, however, that in the illustration there are at least two bell-mouth horns shown in which the bell curved gradually along the length of the horn.

XQ. 83. Do you agree with the statement on page 72 in the same book as follows:

“The latitude as to form and shape being

(Deposition of Rudolph M. Hunter.)

greater than the resource in material, there having been almost innumerable attempts in that line."

A. I only agree with that statement in respect to its application to Mr. Edison's special experimental work in which he was endeavoring to make the same horn act for recording sound as well as for reproducing sound. I must admit, however, that there was very great latitude possible in the shaping the horn as to size and as to convenience in its construction in the shop, considerable experimenting was no doubt done in this respect, as I have before indicated in my testimony on cross-examination.

XQ. 84. Are you now able to say whether or not you can chart out or sketch the nodal lines of the horn "A" under the conditions mentioned in my previous question to that effect?

A. After careful consideration of the matter, it is my opinion that the nodal lines which form on the metal surface of the horns in use cannot be illustrated with any degree of definiteness which could be of any use by way of explanation as to their alinement and which could be considered an accurate exposition of the results of the experiment. The fact is, that these nodal lines vary in their arrangement longitudinally, along the length of the horn because of the different surface areas presented and also because there is always a point between the ending of one arrangement due to a certain diameter or surface width and the beginning of the next position of the rearrangement due to a sufficient change in these

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dimensions. It is my opinion that a diagram could not be made which would be a [265] reliable illustration of the position of these nodal lines, except by charting them after a very extensive series of definite experiments for that purpose and these, of course, I did not attempt to make. What I was more concerned in was, the determination of the presence of vibration in the metal of the horn and more particularly along the lines of the seams or ribs according to the particular horn I might be testing. It is also to be kept in mind that these nodal lines vary with the intensity of sound being reproduced and consequently their position for one sound would not apply to their position for a more intense or less intense sound. I do not think that it would be possible for me to make any diagram which could be considered as sufficiently accurate to define just what the nodal lines are which takes place in these horns or any of them.

XQ. 85. Is your answer the same as to the remaining horns designated as "B," "C," "D," "E" and "F," or any of them?

A. It is. I have purposely included all of the horns in my previous answer.

XQ. 86. Did you keep any notes or data of any kind during the course of experiments?

A. No, I did not keep any notes as to each particular experiment, because, as you will understand, the results with every sound and intensity of sound that was being reproduced, and beyond certain fundamental results, namely, those to which I have testified, I

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did not consider that these results vary of the tests would be material. The two main things in the test were to determine by standing in front of the horns during reproduction whether the reproduction were impressed with extraneous sounds as stated to occur in the Nielsen Patent in suit, and secondly to determine whether or not the so-called ribs of the Nielsen construction or of the seams employed in the defendant's construction of horn or the mere bends [266] without seams or ribs such as in "Horn E" vibrated under normal conditions of operation of the reproducing instrument as a whole.

Cross-examination closed.

Mr. HILLIARD.—I ask to have marked for identification the book shown the witness, the same to be marked "Complainant's Exhibit marked for Identification Edison Manual."

Redirect Examination by Mr. ACKER.

RDQ. 87. Mr. Hunter, is there anything you desire at this time to add to the testimony just given by you in the way of explanation or otherwise?

A. I might say that in making the tests to satisfy myself as to whether there were or were not the elimination of vibrations by the employment *or* ribs or seams in the amplifying horn structures, I employed the only possible ways of determining the presence of such vibrations, namely, by the use of the ear directly and through the use of microphone devices, as the ear is the only means of detect-

(Deposition of Rudolph M. Hunter.)

ing a possible or objectionable extraneous sound which may be emitted from the reproducing machine, it should also be the most available detector of such sounds and vibrations which cause them, if they are present, available in making the experiments.

RDQ. 88. I note in your answer to XQ. 82 the portion appearing thereof on page 89 that you designate the series of horns appearing in the book just marked for identification and on page 70 thereof as illustrations of recording horns and employed in connection with the Edison machine referred to in the said publication for recording and reproducing purposes. Please explain how a horn adapted for these purposes in connection with an Edison machine differentiates from an amplifying horn employed in connection with the disc talking machine placed on the market, that is a machine by the defendant company?

A. In the case of the machine put on the market by the defendant company, the amplifying horn is supported upon a bracket and [267] into the small end of the horn is delivered the sound vibrations from the sound-box which is allowed to travel across the sound record, the sound vibrations produced in the sound-box being delivered to the small end of the amplifying horn by a swinging tube. In this case, the great weight of the horn is supported by the bracket and does not come upon the sound-box and does not partake of the movement of the sound-box. In the Edison form of machine referred

(Deposition of Rudolph M. Hunter.)

to in the publication, the sound-box was caused to travel over the length of a revolving cylinder of wax upon the periphery of which a helical vertically undulating record was engraved. On page 18 of the book is shown a perspective view of one of the Edison machines without the horn attachment. The horn or the hearing tubes as the case may be are attached to the tubular part 89 back of the sound-box. On page 14 the hearing tubes are shown as so connected at the point 61. This is also shown at 89 on page 31, the upper figure on this page having the hearing tubes and the lower figure showing the use of a mouth-piece 29, the latter being for recording and the former being for reproducing. When horns are employed in place of the hearing tube, they are fixed either directly upon the tubular projection 89 on page 18 and carried with the sound-box or where they are of large size they have been supported on a tripod or otherwise and the small end of the horn connected by a flexible tube very much as the mouth-piece is connected by the flexible tube 29 on page 31. In this Edison machine the record was engraved upon the wax surface of the cylinder by talking into the horn and then by readjusting the sound-box to its original position, the recorded sound so made would then be delivered through the same horn. As I understand it, the tubes or horns illustrated on page 70 are various forms which Edison seems to have used in his endeavor to make a recording horn answer the purpose of a reproducing horn. As I [268] have be-

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fore pointed out, in the Edison machine the horn which he was employing for recording was also required to reproduce the sound recorded, and these were inconsistent requirements from a single horn, because a horn which is suitable for recording is not suitable for reproducing, and therefore Edison's experiments in that line were only in connection with the difficult problem which he set out to accomplish and which should never have been attempted.

In the case of the horns employed in the machine put on the market by the defendant, and I am not referring to the disc machine which employs laterally undulating sound record, the amplifying horn was only required to reproduce the sounds which were recorded in the disc by an entirely different machine, which machine is only employed at the factory where the sound records are made. The problem was a different problem from the horns employed on the defendant's machine. In the machine sold by the defendant, the horn had no difficult problem to solve, as it were, since the only real function of the horn is to give proper amplification and delivery of the amplified sounds to the hearers, the character of the sound already having been determined by the recording machine. In other words, one recording machine might be the source of the production of records which might be used on a million reproducing machines, whereas in the Edison machine described in the publication, the object was to make each machine reproduce its own records.

RDQ. 89. Am I correct in understanding the last

(Deposition of Rudolph M. Hunter.)

answer that the Edison machine referred to in the book marked for identification is a machine by which the owner thereof may make thereon by the use of a wax cylinder his own records and at the same time the machine be employed for the reproduction of such recorded record sounds? By the expression the same time as used in the question, I mean that you could use the machine for each purpose? [269]

A. Yes, you are correct.

RDQ. 90. Is it your understanding that the matter contained in the book publication marked for identification relates to the problems and difficulties incident to the Edison machine, or does it deal with the problems of the talking machine art generally?

Mr. HILLIARD.—Objected to as immaterial.

A. In my opinion it deals with the problem which is specifically presented by the Edison machine, a problem which does not come into the use of a machine of the character sold by the defendant and employing the disc record.

Redirect examination closed.

It is hereby stipulated by and between counsel that all the exhibits, physical and documentary introduced during the taking of testimony both here and in Pittsburgh, may be withdrawn without order of Court when desired by counsel for either side for use in connection with the equity suit pending in the United States District Court for the District of New Jersey and entitled Searchlight Horn Co. vs. Victor Talking Machine Co..

(The signature of the witness is waived.)

Commonwealth of Pennsylvania,
County of Philadelphia,—ss.

I, Alexander Park, a Notary Public in and for the Commonwealth of Pennsylvania, county of Philadelphia, duly commissioned and qualified and authorized to administer oaths, and to take and certify depositions, do hereby certify that pursuant to notice issued and served in the civil cause pending in the United States District Court for the Northern District of California, Second Division, in Equity—No. 15,623, wherein the Searchlight Horn Company is plaintiff and Sherman, Clay & [270] Company is defendant, I was attended at my office, 705 Witherspoon Building, in the city of Philadelphia, county of Philadelphia, Commonwealth of Pennsylvania, by Frederick S. Duncan and John H. Hilliard, of counsel for the plaintiff, and Nicholas A. Acker, of counsel for the defendant, on the 25th, 26th, 27th, 29th, and 30th days of June, 1914, and on the 1st and 2d days of July, 1914, and by the witnesses Norman S. Hobbs, Virginius W. Moody, Charles F. Willard and Rudolph M. Hunter, who were of sound mind and lawful age and were by me first carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, and they thereupon testified as above shown, and that the depositions of the said Norman S. Hobbs, Virginius W. Moody and Charles F. Willard, were taken stenographically by Cora A. Witmer, who was by me first duly sworn to truthfully take and reduce to typewriting the said depo-

sitions of the said Norman S. Hobbs, Virginius W. Moody and Charles F. Willard, and the said depositions of the said Norman S. Hobbs, Virginius W. Moody and Charles F. Willard were reduced to type-writing by the said Cora A. Witmer in my presence and under my personal supervision. That the deposition of the said Rudolph M. Hunter was taken directly on the typewriter by the said Cora A. Witmer and in my presence and under my personal supervision, and by agreement of counsel the said deposition of Rudolph M. Hunter was taken on non-lined paper, and the said depositions of the said Norman S. Hobbs, Virginius W. Moody, Charles F. Willard and Rudolph M. Hunter were taken at the place and time specified pursuant to notice. I further certify that the reason for taking the said depositions was, and is, and the fact was and is that the said deponents live more than 100 miles from the place where the said civil suit is appointed by law to be tried, the witness Norman S. Hobbs, being a resident of Brooklyn, New York, the witness Virginius W. Moody, being a resident of [271] New York City, New York, the witness Charles F. Willard, being a resident of Camden, New Jersey, and the witness Rudolph M. Hunter, being a resident of Philadelphia, Pennsylvania. That I am neither of counsel nor attorney to either of the parties to the said suit, nor interested in the event of said cause, and that it being impracticable for me to deliver the said depositions into the court for which they were taken, I have retained the same for the purpose of being sealed up and directed under my

own hand and speedily and safely transmitted to the said court for which they were taken and to remain under my seal until there opened.

As witness my hand and seal as such notary public at Philadelphia, Pennsylvania, on the 21st day of July, A. D. 1914.

ALEXANDER PARK, [Seal]

Notary Public, Commonwealth of Pennsylvania,
County of Philadelphia.

[Endorsed]: Filed Jul. 27, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [272]

(Title of Court and Cause.)

Defendant's Notice of Taking Depositions.

PLEASE TAKE NOTICE that defendant herein, pursuant to the statutes in such case made and provided will take the testimony of

Ellsworth A. Hawthorne, who resides at Bridgeport, Conn.;

John H. George, who resides at Bridgeport, Conn.;

Frank H. Stewart, who resides at Philadelphia, Pa.;

Horace Sheble, who resides at Philadelphia, Pa.;

John Kaiser, who resides in New York, N. Y.;

Walter H. Miller, who resides in Orange, N. J.;

Edward W. Meeker, who resides at Orange, N. J.;

Camillus A. Senne, who resides in New York, N. Y.;

William A. Lawrence, who resides in East Orange, N. J.;

Joseph F. McCoy, who resides in Orange, N. J.;

Louis Hicks, who resides in Englewood, N. J.

And of others, whose names and residences will hereafter be given, on due notice, each and all of whom reside and live at a greater distance from the place of trial herein than one hundred (100) miles and more than one hundred miles from any place at which a District Court of the United States for the Northern District of California, Second Division, is appointed to be held by law, for use on behalf of the defendant at the trial herein before Frank Z. Demarest, a notary public in and for the city, county and State of New York, or other notary public or officer duly authorized to take such testimony, who is not of counsel or attorney for either of the parties herein nor interested in the event of this cause, at the office of Louis Hicks, No. 233 Broadway, Borough of Manhattan, city, county and State of New York, on the 2d day of September, 1913, at 11 o'clock in the forenoon of that day.

You are invited to attend and cross-examine the witnesses produced. The cross-examination will be adjourned from day to day to such time as may be required, without further notice.

Dated August 22, 1913.

Yours, etc.,

DAN HADSELL,

Solicitor for Defendant.

LOUIS HICKS,

Of Counsel for Defendant.

TO MILLER AND WHITE, Esqs.,
Solicitors for Plaintiff,
Crocker Building,
San Francisco, Cal.

Service of a copy of the foregoing notice on this
27th day of August, 1913, is hereby admitted.

Dated August —, 1913.

Solicitors for Plaintiff. [273]

State of California,
City and County of San Francisco,—ss.

V. G. Skinner, being first duly sworn, deposes and
says:

That at all the times herein mentioned he was
over the age of eighteen years and not a party to the
above-entitled action. That on the 27th day of Au-
gust, A. D. 1913, he served the hereunto attached no-
tice of taking depositions upon the attorneys for the
plaintiff by leaving a copy of the same with the sten-
ographer in charge of the office of the said attorneys
by showing to her the original to which this affidavit
of service is attached. That at the time of the said
service neither of the said attorneys were in the of-
fice. That said service was made between the hours
of nine o'clock A. M. and five o'clock P. M. of said
day.

V. G. SKINNER.

Subscribed and sworn to before me this 30th day of
August, A. D. 1913.

[Seal]

J. D. BROWN,
Notary Public in and for the City and County of San
Francisco, State of California. [274]

(Title of Court and Cause.)

Defendant's Notice of Taking Depositions.

PLEASE TAKE NOTICE that defendant herein, pursuant to the statutes in such case made and provided, will take the testimony of

W. E. Parker, who resides at Bridgeport, Conn.

Mr. Elwell, manager of the talking-machine department of the Heppe Co., 1022 Chestnut St., Philadelphia, Pa., who resides at Philadelphia, Pa.;

each of whom resides and lives at a greater distance from the place of trial herein than one hundred (100) miles and more than one hundred (100) miles from any place at which a District Court of the United States for the Northern District of California, Second Division, is appointed to be held by law, for use on behalf of the defendant at the trial herein; and

PLEASE TAKE NOTICE that the testimony of said W. E. Parker will be taken before Frank Z. Demarest, a notary public in and for the city, county and State of New York, or other notary public or officer duly authorized to take such testimony, who is not of counsel or attorney for either of the parties herein nor interested in the event of this cause, at the office of Louis Hicks, No. 233 Broadway, Borough of Manhattan, city, county and State of New York, on the 9th day of October, 1913, at 11 o'clock in the forenoon of that day; and

PLEASE TAKE NOTICE that the testimony of said Mr. Elwell will be taken before Alexander Park, a notary public in and for the city and county of

Philadelphia, State of Pennsylvania, or other notary public or officer duly authorized to take such testimony, who is not of counsel or attorney for either of the parties herein, nor interested in the event of this cause, at the office of Horace Pettit, No. 705 Witherspoon Building, Walnut St., below Broad St., Philadelphia, Pa., on the 10th day of October, 1913, at 11:00 o'clock in the forenoon of that day.

You are invited to attend and cross-examine the witnesses produced. The cross-examination will be adjourned from day to day to such time as may be required, without further notice.

Dated October 7th, 1913.

Yours, etc.,

DAN HADSELL,

Solicitor for Defendant.

LOUIS HICKS,

Of Counsel for Defendant.

To Searchlight Horn Co., Plaintiff,

MILLER & WHITE, Esqs.,

Solicitors for Plaintiff,

Crocker Building,

San Francisco, Cal.

Service of a copy of the foregoing notice on this 7th day of October, 1913, is hereby admitted.

Dated October 7th, 1913.

HADSELL & DUNCAN,

Of Counsel,

Solicitors for Plaintiff. [275]

(Title of Court and Cause.)

Testimony on Behalf of the Defendant.

Taken pursuant to notice under the Statutes of the United States in such case made and provided on the 2d day of September, 1913, at 11 A. M., before Frank Z Demarest, a notary public in and for the city, county and State of New York at the office of Louis Hicks, 233 Broadway, New York, N. Y.

Present: LOUIS HICKS, of Counsel for Defendant.

No appearance for Complainant.

[Deposition of Walter H. Miller, for Defendant.]

WALTER H. MILLER, being duly sworn, testifies as follows:

Direct Examination by Mr. HICKS.

Q. 1. Please state your name, age, residence and occupation.

A. My name is Walter Henry Miller; 43 years old; reside at 26 Linden Place, Orange, New Jersey. My business is manager of the Recording Department of Thomas A. Edison, Inc., at 79 Fifth Avenue, New York.

By Mr. HICKS.—Complainant's counsel, Mr. John H. Miller, through his letters and through his New York representative, Mr. Catlow of the office of Messrs. Duncan & Duncan, has requested defendant's counsel to adjourn the taking of depositions on behalf of defendant under the notice served upon Messrs. Miller & White, solicitors for complainant. Mr. Catlow has stated that he will be present to-morrow. Therefore the continuation of the deposition of the present witness and the taking of the deposi-

(Deposition of Walter H. Miller.)

tions of the other witnesses named in the notice is adjourned to September 3, 1913, at 11 A. M., same place.

New York, Sept. 3, 1913.

Met pursuant to adjournment.

Present: JAMES N. CATLOW, Esq., Representing
Miller & White, Esq., of Counsel for
Plaintiff.

LOUIS HICKS, Esq., of Counsel for De-
fendant.

WALTER H. MILLER resumes the stand.

It is agreed by and between counsel that the continuation of the deposition of the present witness and the taking of the depositions of the other witnesses named in the notice served on behalf of defendant is adjourned to September 11, 1913, at 11 A. M., same place; and that defendant's time to take depositions herein is extended two weeks from September 20, 1913. [276]

New York, September 11, 1913.

Met pursuant to adjournment.

Present: JOHN H. MILLER, Esq., and
FREDERICK S. DUNCAN, Esq., Coun-
sel for Plaintiff.

LOUIS HICKS, Counsel for Defendant.

Direct Examination of WALTER H. MILLER,
Continued by Mr. HICKS.

Q. 2. Please state what experience you have had with respect to phonographs and talking machines generally.

(Deposition of Walter H. Miller.)

A. I have been in the phonograph business for the last twenty-three years experimenting with sound recording and reproducing and am now manager of the Recording Dept. of Thomas A. Edison, Inc. I was first connected with Mr. Edison at his laboratory assisting him in perfecting his first phonograph which used wax records. I then became an expert for the North American Phonograph Company. When this company went into the hands of a receiver we purchased part of their plant and with Mr. Walcutt and two others I formed a company named Walcutt, Miller & Co. This company was started in September, 1894. In February, 1896, I retired from this company and connected myself with the Phonograph Record and Supply Company. I retired from this company in March, 1897, and in May, 1897, I was engaged by the National Phonograph Company to take care of their recording plant and have been with that company to this day.

Q. 4. Is Thomas A. Edison, Inc., the same corporation as the National Phonograph Company with the exception of a change in name? A. It is.

Q. 5. Do you know in what year the North American Phonograph Company was organized and please state in what year you became connected with it.

A. As near as I can remember the North American Phonograph Company was organized in 1889 or 1890 and it was about 1890 when I became connected with it. [277]

Q. 6. For how long before you became connected with the North American Phonograph Company

(Deposition of Walter H. Miller.)

were you working for Mr. Edison on phonograph matters?

A. I became connected with Mr. Edison during the fall of 1887.

Q. 7. Since the fall of 1887 have you been devoted exclusively to the phonograph or talking-machine business? A. I have.

Q. 8. Please state whether there was any phonograph business before you became connected with Mr. Edison in the fall of 1887.

A. Not to my knowledge.

Q. 9. Can you state whether since the fall of 1887 there has been any improvement in the reproduction of sound by means of phonographs or other talking machines; and if so, state to what that improvement has been due.

By Mr. MILLER.—This question is objected to as incompetent as calling for the opinion of the witness and not for a statement of fact.

A. Phonographs have been very much improved since that date. Improvements have been in the recording of the record and the material of which the records have been made, also the process used in the manufacture of these records and reproducing.

A. 10. Has there been any improvement in the construction and operation of the phonograph or machine used in reproducing sound from the sound record?

By Mr. MILLER.—Same objection as before.

A. There has been a number. The principal one affecting the reproduction has been the reproducer.

(Deposition of Walter H. Miller.)

Q. 11. Please state whether your work relating to phonographs since the fall of 1887 has dealt with the recording of the record, the material of which the record has been made, the process used in the manufacture of these records, the reproducing of sound therefrom and the construction and use of the reproducer.

A. I have been working on all these various developments since that time but the major part of my work has been in recording records. [278]

Q. 12. Have you, since the fall of 1887, been familiar with horns employed with the phonograph and other talking machines in the recording and reproduction of sound? A. I have.

Q. 13. Please state from your experience whether you have been able to observe that any part of the improvement in the reproduction of sound by means of the phonograph or other talking machine has been due to any change or improvement in the horn used therewith.

By Mr. MILLER.—Same objection as to Q. 9.

A. There has not. I had reproducing horns in 1900 at our recording plant at Orange which were equal if not superior to any now used on the market.

By Mr. MILLER.—I move to strike out all that portion of the answer commencing with "I had reproducing horns" as not responsive to the question and also as a mere statement of the opinion of the witness.

Q. 14. Please describe the reproducing horns which you had in 1900.

(Deposition of Walter H. Miller.)

By Mr. MILLER.—If this evidence is offered for the purpose of anticipation it is objected to on the ground that no notice of it has been set up in the answer.

A. This was a brass horn with a spun bell about two foot in diameter at the large opening and tapered down to the usual opening, five eighths of an inch. The length over all was about fifty-six inches.

Q. 15. Have you read the patent in suit No. 771,441 of October 4, 1904, to Nielsen? A. I have.

Q. 16. Do you understand the construction of the horn described therein? A. I do.

Q. 17. Are you familiar with the Edison straight horn and the Edison Cygnet horn that have been put upon the market by Thomas A. Edison, Inc., in recent years? A. I am.

Q. 18. Are you familiar with any horn put upon the market in recent years by the Victor Talking Machine Company being built up of tapering strips of metal joined together at their edges by lock seams?

A. I am. [279]

Q. 19. Please state whether there is any difference between the seams of the said two Edison horns referred to and the said Victor horn referred to on the one hand and the seam employed in constructing the Nielsen horn according to the description of the Nielsen patent in suit.

By Mr. MILLER.—Question objected to as incompetent, irrelevant and immaterial in that the witness has not qualified as a mechanical expert having such knowledge as is called for by the question and fur-

(Deposition of Walter H. Miller.)

thermore it is not the best evidence and merely calls for an opinion, the best evidence being the construction of the horns themselves from which the court can see the difference and similarities, if any.

By Mr. HICKS.—As the horns referred to are already in evidence in this suit on the motion for preliminary injunction and will be produced on the trial of this cause and since, in view of the objection, the witness will be qualified as a mechanical expert in the construction the witness is requested to answer the question now to save time.

A. The method of putting together the tapering strips of metal in the Nielsen horn is very different from the method used in putting together the Edison and Victor horns. In the Edison and Victor horns the tapering strips of metal are fastened together with what is known as the lock seam. The sides of each adjoining tapering strips are bent over U-shape and one locks within the other, a method which is ordinarily used by plumbers in laying tin roofs. The method used in the Nielsen horn, the tapering strips at their edges are bent at right angles forming an L. These L's are held together and soldered. Each seam has a stiffening effect on the horn similar to angle irons in general construction work and has a much more stiffening effect than the lock seam used in the Edison and Victor horns.

Q. 20. In your work relating to the phonograph since the fall of 1887 have you had occasion to design and construct horns for the recording of sound?

A. I have.

(Deposition of Walter H. Miller.)

Q. 21. In view of the objection by complainant's counsel please state to what extent you have designed and constructed horns for phonographs. [280]

A. I have possibly superintended the making the last twenty years of two or three hundred horns of various description, all horns which we use for recording are specially constructed horns and cannot be purchased on the open market and it is therefore very necessary to be familiar with horn constructions in order to have any success in recording a record.

Q. 22. Did you take any part in the designing and construction of the Edison Cygnet horn?

A. I did.

Q. 23. And the Edison straight horn?

A. I did not.

Q. 24. Is the Edison Cygnet horn one used for recording or reproducing?

A. It is used for reproducing.

Q. 25. Did you take any part in designing and constructing any other horn used for reproducing?

A. I have.

Q. 26. Have you ever known of a horn constructed according to the description of the Nielsen Patent in suit, having butt seams to join together the edges of the tapering strips of metal as described by you, being upon the market or in use among users of phonographs? A. I have not.

Q. 27. Please compare the reproducing horn, such as the fifty-six inch brass horns with a spun bell, with which you were familiar as early as 1900, with the Edison straight and Cygnet metal horns and the

(Deposition of Walter H. Miller.)

Victor metal horn referred to, consisting of tapering metal strips joined together at their edges by lock seams, with respect to their respective sound-producing qualities.

By Mr. MILLER.—Objected to as irrelevant, incompetent and immaterial.

By Mr. HICK.—Defendant's counsel understands that it is the position of complainant's counsel that an improvement in the reproduction of sound was brought about by the use of such horns and that such horns are an infringement of one or more of the claims of the patent in suit. It is the purpose of defendant's counsel to show whether or not the position of complainant's counsel is correct or not. [281]

A. The fifty-six inch brass bell spun horn gives a superior reproduction than the Edison straight or Cygnet horn both in volume and tone. The Victor horn I have never compared.

Q. 28. From your experience in the construction of horns for recording and reproducing sound and from your familiarity generally with such horns, can you state whether the construction of a horn according to the method described in the Nielsen Patent in suit, using the butt seam, is more or less difficult than the construction of a horn like the Edison straight horn which employs the lock seam? Please answer this question yes or no.

By Mr. MILLER.—Objected to as irrelevant, incompetent and immaterial, as showing no sufficient foundation laid and also as calling for the opinion of a witness on a matter concerning which he has

(Deposition of Walter H. Miller.)

not qualified as an expert for the purpose of giving an opinion.

A. Yes.

RECESS.

Q. 29. In view of the objection of complainant's counsel please state what experience, if any, you have had in the construction of metal horns built up of tapering strips of metal joined together at their edges, by some kind of seam.

A. I have constructed Cygnet shaped horns of tapering strips of metal; also made straight horns.

Q. 30. Please state whether the Cygnet and straight horns that you have made of tapering strips of metal joined together at their edges by seams have included horns for reproducing and for recording sound?

A. They have.

Q. 31. Now please state whether the construction of a horn according to the method described in the Nielsen Patent in suit, using the butt seam, is more or less difficult than the construction of a horn like the Edison straight horn which employs lock seams, and give your reasons.

By Mr. MILLER.—Same objection as to Q. 28.
[282]

A. In the construction of the Edison straight horn the use of the lock seam in assembling the tapering strips is much easier and they can be assembled without a form as the lock seam assists the holding together while with the butt seam as in the Nielsen Patent some form is necessary to hold the tapering

(Deposition of Walter H. Miller.)

strips together while the butt seams are being soldered together.

Q. 32. In making the Nielsen horn with the butt seam is the use of solder essential?

By Mr. MILLER.—Same objection as to Q. 28.

A. It is not.

Q. 33. If solder is not employed how can the flanges or edges forming the butt seams of the Nielsen horn be secured together so that they will remain together after the horn has been removed from the form?

By Mr. MILLER.—Same objection as to Q. 28.

A. These flanges can be held together by small rivets or one of the flanges can be left a little longer than the other and bent over in the shape of a U.

Q. 34. Do you find in the Nielsen Patent in suit any suggestion of either of the two methods suggested by you in your last answer? A. I do not.

Q. 35. If the butt seam of the horn shown in the Nielsen Patent be made of the flanges shown in the patent, is the use of solder essential to join the strips together?

By Mr. MILLER.—Same objection as to Q. 28.

A. I would not say it was essential but preferable.

Q. 36. The Nielsen Patent does not disclose, so far as I can see, any provision for the use of rivets, nor does it disclose the bending over of either of the flanges of which the butt seam is made. Assuming that flanges are employed as shown and described in the Nielsen Patent do you know of any method whereby such flanges can be joined together without

(Deposition of Walter H. Miller.)

the use of material such as solder? [283]

By Mr. MILLER.—Same objection as to Q. 28.

A. In answer to Q. 29 I stated that flanges such as are used in the Nielsen Patent could be fastened together with rivets or one of the flanges can be left a little longer than the other and bent over in the shape of a U.

Q. 37. You have not understood my question. I understand that you say that the Nielsen Patent does not disclose the use of rivets and does not disclose the use of a flange that is longer than its adjacent flange. What I ask is whether if you use flanges such as are shown and described in the Nielsen Patent, both flanges being of the same height and no provision for the use of rivets being made, the flanges can be joined together without the use of material such as solder.

By Mr. MILLER.—Same objection as to Q. 28 and also as leading and suggestive and an attempt at the cross-examination of the witness.

By Mr. HICKS.—It is very clear that the witness did not understand the previous question.

A. There is no other method described in the Nielsen Patent of securing the tapering strips together except the use of solder.

Q. 38. And do you know any any other method that could be employed?

By Mr. MILLER.—Same objection as to Q. 28.

A. None except those mentioned in Q. No. 33.

Q. 39. In joining the tapering strips of metal together by the use of the lock seam in the construction of a horn for a phonograph is the use of solder or of

(Deposition of Walter H. Miller.)

anything else essential other than pressing the interlocking bent-over parts together?

By Mr. MILLER.—Same objection as to Q. 28 and as leading and suggestive.

A. No.

Q. 40. From the reading of the Nielsen Patent in suit and from your experience in the phonograph art, what do you understand to be the important feature or features of construction of the horn described in the patent? [284]

By Mr. MILLER.—Same objection as to Q. 28.

A. The features of construction of this horn, it seems that the idea was to construct a horn which was very stiff and exceptionally strong, a result obtained by the butt seam.

Q. 41. Will the butt seam make a horn stiffer or stronger than the lock seam, or other seam?

By Mr. MILLER.—Same objection as to Q. 28 also as leading and suggestive.

A. It will. The butt seam is the stiffest seam that I know of.

Q. 42. Can you explain why the butt seam produces a horn so stiff or strong; and if so, please do so.

By Mr. MILLER.—Same objection as to Q. 28.

A. The butt seam has the same stiffening effect as angle irons have in general construction work. The turning of the edges of the tapered strips at right angles give this angle iron effect.

Q. 43. Can you state when the National Phonograph Company began to make sound records?

By Mr. MILLER.—Objected to as incompetent, ir-

(Deposition of Walter H. Miller.)

relevant and immaterial.

A. Some time in May, 1897.

Q. 44. Where?

By Mr. MILLER.—Same objection.

A. Orange, New J ersey.

Q. 45. Did you take part in the making of those sound records at that time and place?

By Mr. MILLER.—Same objection. I desire that this objection be considered as interposed to all questions relating to the making of sound records.

By Mr. HICKS.—Defendant's counsel is pleased to learn that such objections are no longer to appear upon the record after each question. The purpose of defendant's counsel is to show that the witness employed horns at the time and place indicated in connection with the phonograph.

A. I did.

Q. 46. Have you at the present time any horn that was used by you [285] or under your direction at that time and place in the making of sound records?

A. I have.

Q. 47. Can you produce it here? A. No.

Q. 48. What has become of it?

A. I believe it was taken to San Francisco by Mr. Hicks.

Q. 49. Did you have it at the time you verified your affidavit, on June 5, 1913, upon the motion for preliminary injunction in this suit? A. I did.

Q. 50. Did you annex a photograph of the horn to your said affidavit? A. I did.

Q. 51. Was that photograph a correct photograph

(Deposition of Walter H. Miller.)

of the horn? A. It was.

Q. 52. I show you a photograph. Please state what it is.

A. This is a reproducing horn, part of the small end of which is cut off in order to leave the opening about three inches. This horn was used in our recording rooms as a megaphone in announcing the names of selections which were recorded at that time. In speaking through a horn of this kind it enabled us to announce to more machines at one time and at the *same make* a more perfect announcement.

Q. 53. And is the photograph which I handed you a correct photograph of the horn which you say you used in recording sound records at Orange in May, 1897? A. It is.

By Mr. HICKS.—As the horn shown by the photograph has for convenience at the trial of this cause and for the purposes of the argument of the appeal from the order for preliminary injunction been left by the defendant's counsel in San Francisco, together with a number of other horns used in this cause, the photograph is offered in evidence, and marked "Defendant's Exhibit, photograph of horn used by National Phonograph Co. in May, 1897, Frank Z. Demarest, Examiner."

By Mr. MILLER.—If the horn itself is introduced in evidence at the trial I make no objections to the printed photograph but if the horn is not introduced in evidence I object to the photograph as incompetent, [286] irrelevant and immaterial and as secondary evidence.

(Deposition of Walter H. Miller.)

Q. 54. I show you another photograph and ask you to state what it is.

A. This is a horn similar to the one described in my last answer except that it is not cut off at the small end and in this form it was used as a reproducing and recording horn.

Q. 55. Did you have the original horn from which this second photograph was made at the time you made your said affidavit of June 5, 1913, and did you annex to said affidavit a duplicate copy of said photograph? A. I did.

Q. 56. What has become of the horn from which this second photograph was taken?

A. I understand that it has been taken to San Francisco.

By Mr. HICKS.—As the horn from which this second photograph was taken is at present in San Francisco, with the other horn mentioned, the photograph referred to is offered in evidence and is marked “Defendant’s Exhibit, photograph of horn showing the condition of the horn shown by ‘Defendant’s Exhibit, photograph of horn used by National Phonograph Co. in May, 1897’ before the small end thereof was cut off.”

Q. 57. How early to your knowledge, were horns such as those shown by the two photograph exhibits, just offered in evidence, upon the market and in use in the United States?

By Mr. MILLER.—I make the same statement regarding this second photograph as I did regarding the first photograph.

(Deposition of Walter H. Miller.)

A. I know that these horns were on the market as early as September, 1894, as they were sold by Walcutt, Miller & Company at Fourteenth Street, New York City.

Q. 58. Do you know whether the horns shown by these two photograph exhibits were used by the North American Company in the United States and before that company went into the hands of a receiver?

A. Some of these horns which we sold at that time were purchased from the receiver of the North American Phonograph Company. As to [287] just when the North American Company introduced them I do not remember.

Q. 59. Where did Walcutt, Miller & Co. purchase such horns from the North American Phonograph Co.?

A. The horns which we purchased from the North American Phonograph Company were ones that were in their recording plant at Fourteenth Street, New York, at the time the company went into the hands of a receiver. After that date I think we purchased them from the Tea Tray Company in Newark, New Jersey.

Q. 60. Please describe the construction and use in 1894, and prior thereto, of horns shown in the two photograph exhibits.

By Mr. MILLER.—Question *objection* to as incompetent, irrelevant and immaterial in so far as the construction is concerned because the horn itself is the best evidence of its construction and nothing that

(Deposition of Walter H. Miller.)

this witness can say could alter that construction.

By Mr. HICKS.—The testimony of the witness shows that he is an expert in this art and that his expert knowledge includes the construction and use of horns and all other parts of a phonograph from the beginning of the art to this day. The witness is competent to explain the construction and use of the horns in question.

By Mr. MILLER.—I am not objecting to the testimony in regard to the use of the horn but to the construction of the horn. The horn being before the Court the construction is apparent and it is a useless waste of time to have witnesses describe that construction.

A. These horns were constructed of brass, the body portion of the horn consists of two tapering strips put together with lock seams. The body portion of the horn was about twenty inches long. The bell portion of the horn was made of two pieces of sheet brass fastened together with lock seams. The body portion and the bell portion were also secured together with lock seams and they were used for recording and reproducing.

Q. 61. Who used the horn cut off at the small end and shown in the first exhibit photograph when the National Phonograph Company began [288] making sound records in Orange, New Jersey, in May, 1894?

A. This horn was used by Mr. Atz who was piccolo player in our band at the time and later we employed a man by the name of Edward Meecker to make all

(Deposition of Walter H. Miller.)

our announcements, and who used this horn.

Q. 62. Do you know whether Meecker was called away from his employment by the National Phonograph Company to go to the Spanish-American War?

A. He was.

Q. 63. Did he use this horn for making the announcements referred to by you before or after he was called away to go to the Spanish-American War?

A. Before.

Q. 64. Did he return to the employ of the National Phonograph Company after his return from the war?

A. He did.

Q. 65. And did he resume the use of this horn upon his return? A. He did.

Q. 66. What part, if any, did you take in the recording of sound records by the National Phonograph Company at Orange, N. J., in May, 1897, and in the use of this horn first by Atz and then by Meecker before Meecker was called away to the Spanish-American War?

A. I was manager of this department and directed them to use the horn.

Q. 67. In whose possession has this horn been since it was used in May, 1897, down to the time that you gave it to me in June, 1913?

A. It was stored away with a lot of other miscellaneous horns at the factory in Orange.

Q. 68. In the factory of what company?

A. I say the factory when I speak generally. These horns are stored in a room we have for the

(Deposition of Walter H. Miller.)

purpose in the laboratory of Mr. Edison at Orange, New Jersey.

Q. 69. Between the fall of 1887, when you became connected with Mr. Edison, and the year 1901, say, what materials were used to your knowledge, in this country, in the construction of horns for phonographs and similar machines? [289]

A. Tin, zinc, copper, wood, paper, glass and a composition such as used in ink rollers and rubber and brass, and aluminum.

Q. 70. Have you any personal knowledge of the use of celluloid for such purpose during said period?

A. I have. A few experimental horns were made of this material also.

Q. 71. Confining your statement to the period between the fall of 1887 and the close of the year 1901, say, and to use within the United States what were the sizes of the horns used for recording and reproducing sound with the phonograph and other similar machines?

A. The horns that were mostly used were ones that varied from eight to ten inches in length to six feet although Mr. Edison had one made for an experimental purpose, which was forty feet long. The diameter of these horns varied at the big end from two and a half inches to three feet except the special large horn which Mr. Edison had made, the large diameter of which was about twelve feet.

Q. 72. When was it that Mr. Edison had this horn, forty feet in length and a diameter of about twelve feet at the large end, made?

(Deposition of Walter H. Miller.)

A. As near as I can remember it was in the year 1888 or 1889.

Q. 73. Please describe the construction of this large horn.

A. It was made of heavy galvanized iron made in sections about eight feet long, the ends telescoped into one another and it was a gradual taper from the small end to the large end.

Q. 74. How was each section constructed?

A. That I do not remember.

Q. 75. Do you remember how many pieces of metal the sections were made of?

A. I do not, but it could not be made of one piece owing to the enormous size of the horn.

Q. 76. Please describe the manner in which the horn gradually tapered [290] from the small end to the large end.

A. The horn had a gradual taper from the small end, that is to say, the horn's diameter increased proportionately as regards the distance from the small end of the horn, or, in other words, it was cone shaped.

Q. 77. If you stretched a string taut from the small end to the large end of the horn so that the string was in a plane passing through the central axis of the horn and on the outside of the horn would the string have touched the outer surface of the horn at all points from the small to the large end?

A. It would.

Q. 78. From the fall of 1887 down to the close of the year 1901 in this country what method was em-

(Deposition of Walter H. Miller.)

ployed to your knowledge for joining together the edges of metal used in constructing the horns, when the material employed was metal?

A. During that period our horns were generally constructed with the lock seam and also the lap seam, by the lap seam I mean one piece of metal lays over the other and is soldered together.

Q. 79. From your description of a lap seam I would infer that the difference between the lap seam and the lock seam was that in forming the lap seam the edges of the metal were not bent over and that in forming the lock seam the edges of the metal were bent over. Is that correct? A. It is.

Q. 80. What have you to say with regard to the effect of the size of a horn for phonographs and similar machines upon the quality of the reproduction of sound from a phonograph record with the aid of the horn?

A. Small horns usually give a weaker and sharper reproduction than the larger ones. The larger the horn the tone is much fuller and sometimes louder although if a horn is made too large this improvement does not increase in proportion.

Q. 81. Are you familiar with the Kaiser horn and with Schoettel's [291] Mega Horn? A. I am.

Q. 82. Please compare the two.

A. Their general construction is the same as well as their shape; in fact, I can see no difference.

Q. 83. At the time you made your affidavit in this suit on June 5, 1913, did you produce a Kaiser or Mega horn? A. I did.

(Deposition of Walter H. Miller.)

Q. 84. What has become of it?

A. I believe it has been sent to San Francisco.

Q. 85. I show you a photograph and ask you to state whether or not it is a correct photograph of the Kaiser horn or Mega horn which you say has been sent to San Francisco? A. It is.

Q. 86. Did you deliver the horn from which this photograph was taken, to me? A. I did.

Q. 87. When did you first become acquainted with the Kaiser horn?

A. During the days of Walcutt, Miller & Co., 1894 and 1895.

Q. 88. Please compare the Kaiser horn or Mega horn shown in this photograph with the Kaiser horn with which you were familiar in the days of Walcutt, Miller & Company.

A. The same thing.

Q. 89. Can you give the history of the horn shown in the photograph of which we are speaking?

A. I do not remember any particular history connected with it. It has been kicking around in our laboratory for a long while.

Q. 90. What, if anything, did Walcutt, Miller & Company do with respect to the Kaiser horn?

A. Walcutt, Miller & Company had working for them a man by the name of John Kaiser. Mr. Kaiser outside of his work for the firm gave phonograph exhibits and he used this horn in giving these exhibits and later on started to manufacture them and sell them. As far as I can remember, Walcutt, Miller & Co. did not sell these horns.

(Deposition of Walter H. Miller.)

Q. 91. What material were the Kaiser horns made of with which you were familiar while you were with Walcutt, Miller & Co.? [292] A. Paper.

Q. 92. Of how many pieces of paper did the Kaiser horn consist?

A. That, of course, was according to the size of the horn, several sizes being made. The horn of which I give this photograph seems to have not less than twelve strips of paper. I do not recollect just how many were used in the construction.

Q. 93. Were Kaiser horns made prior to the year 1902, say, larger in size than the horn shown in the photograph?

A. I do not remember seeing any.

Q. Have you any such horn larger in size at the present time?

A. Not larger in diameter. We have some of similar shapes but longer. They are not Kaiser horns.

By Mr. HICKS.—The photograph last referred to by the witness is offered in evidence for the same reason and marked “Defendant’s Exhibit, Schoettel Mega Horn or Kaiser Horn, Frank Z. Demarest, Examiner.”

By Mr. MILLER.—If the horn from which the photograph was made is introduced in evidence I will not object to the photograph. Otherwise I will object on the ground that the photograph is secondary evidence.

By Mr. HICKS.—It is the intention of defendant’s counsel to offer in evidence at the trial the horns from which the photographs were taken, defendant’s

(Deposition of Walter H. Miller.)

counsel being unable to produce at the present time the horns left in San Francisco for the reason stated.

Adjourned to Friday, September 12, at 10:30 A. M., same place.

Sept. 12, 1913.

Met pursuant to adjournment.

PRESENT: JOHN H. MILLER, Esq., Counsel for Plaintiff.

LOUIS HICKS, Counsel for Defendant.

Q. 95. What seam was employed for joining together the strips of paper of which the Kaiser horn was made up? [293]

A. I should say you would call it the lap seam.

Q. 96. What material was used to secure together the strips of paper of which the Kaiser horn was made?

A. I presume it was glue.

Q. 97. What was the shape of the Kaiser horn?

A. The Kaiser horn was what we usually called the bell-shaped; its sides formed a gradual curve from the large opening to the small or very nearly to the small end.

Q. 98. Did you employ the Kaiser horn for the reproduction of sound from the phonograph while you were with Walcutt, Miller & Company?

A. We did.

Q. 99. What result did you obtain from such use of the Kaiser horn at that time?

A. It was thought to be a superior horn to what we were selling. We used it at times for exhibiting records which we were selling.

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Q. 100. What was the horn that you were selling at that time, to which you considered the Kaiser horn superior?

A. As near as I can remember at that period we were selling with the phonographs purchased from us a Japan horn about twenty-six inches long and about twelve inches at its large opening. I think we also sold a few of the two-angled brass horns which I mentioned in my testimony before, which we cut off at the small end. I said two-angled horn because the other horn we sold was a one-angled horn.

Q. 101. Please refer to "Defendant's Exhibit, Photograph of Horn Used by National Phonograph Co. in May, 1897," and point out what are the two angles which you referred to in the answer to the last question.

A. One angle is made of the shape of the body of the horn and the flare of the horn has a much steeper angle.

Q. 102. By angle, you refer to the inclination of the body of the horn or the flare of the horn?

A. I do. Perhaps the words two different tapers might have made [294] my answer more plain.

Q. 103. Have you any other bell-shaped horn that you use with the phonograph for the reproduction of sound? A. I have.

Q. 104. Please produce it. A. I have it here.

Q. 105. Give the history of the horn which you have just produced.

A. This horn or similar horns was used by us in recording and reproducing phonograph records

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some time between 1898 and 1903. In fact, we have used these horns off and on from that date to the present time.

Q. 106. What do you mean by the expression "from that date" in your last answer?

A. I mean that I do not know the exact date that these horns were put in use, but it was some time between the periods of 1898 and 1903.

Q. 107. How do you fix the time at which you used the horn just produced by you as being between 1898 and 1903?

A. We removed our recording laboratory from Orange to New York in March, 1894 and I know that we used this horn two or three years previous to the removal of our laboratory. I also know that we used this horn to reproduce the masters made which were used with the molded record which was placed on the market in 1902. I mean 1904 and not 1894.

Q. 108. According to your last answer you used this horn as early as the year 1902. Can you carry the date back of 1902 by reference to any other date or occurrence of which you have a present positive recollection?

By Mr. MILLER.—Objected to as incompetent because it is leading and suggestive and not the proper way to bring out facts.

A. I cannot, although it should be understood that it was fully a year from the time the first masters were made for this process before the molded records were placed on the market. [295]

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Q. 109. Can you state of what material the horn that you have just produced was made?

A. We always among us called it papier-maché of a construction similar to some water-pails now in the market.

Q. 110. Have you had a photograph made of this horn? A. I have. Here it is.

By Mr. HICKS.—The horn just produced by the witness and the photograph thereof are offered in evidence and marked respectively “Defendant’s Exhibit, Papier-maché Horn used by Walter H. Miller Before March, 1904, Frank Z. Demarest, Examiner,” and “Defendant’s Exhibit, Photograph of Defendant’s Exhibit, Papier-maché Horn Used by Walter H. Miller Before March, 1904, Frank Z. Demarest, Examiner.”

By Mr. MILLER.—If these exhibits are offered for the purpose of anticipation we object to them on the ground that no notice of such anticipation has been set up in the answer as required by the Statutes. If offered merely to show the state of the art, we have no objection.

By Mr. HICKS.—Reference to paragraph 14 of the answer will show that prior use of the Nielsen invention by Walter H. Miller, Thomas A. Edison, Inc., formerly National Phonograph Co., and others is set forth. Paragraph 15 prays leave to add other names when ascertained. Defendant’s counsel is investigating the prior art and will as soon as his investigation has been completed, request complainant’s counsel to stipulate that the answer may be

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amended where necessary or if complainant's counsel will not consent application for leave to amend the answer will be made to the court.

Q. 111. In your answer to Q. 108, you stated that you removed your recording laboratory in March, 1904, and that you used this horn two or three years previous to the removal of your laboratory. Whose laboratory did you refer to?

A. We always call among ourselves, the recording department our laboratory. This was the recording department of the National Phonograph Company.

Q. 112. Please state whether or not you made personal use of this horn before the removal of said laboratory in March, 1904?

By Mr. MILLER.—Question objected to as leading.

A. I did. [296]

Q. 113. Did anyone else to your knowledge make personal use of this horn before the removal of said laboratory in March, 1904; and if so, who?

By Mr. MILLER.—Same objection as to Q. 112, and the two exhibits last put in evidence.

A. Yes, Mr. Harvey Emmons.

Q. 114. Who was Mr. Harvey Emmons and where did he use this horn?

By Mr. MILLER.—Same objection as before.

A. Mr. Emmons was one of the employees of the recording laboratory and the horn was used in building 20 at the factory, Orange, New Jersey.

Q. 115. Please look at Fig. 3, of U. S. Patent No. 534,543 of Feb. 19, 1895, to Berliner, which I show

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you and which I shall shortly offer in evidence and state by what term the shape of that horn is described in the art.

By Mr. MILLER.—Objected to as incompetent, irrelevant and immaterial.

A. It is termed the bell-shaped horn.

Q. 116. I ask you the same question with reference to Fig. 5 of U. S. Patent No. 739,954 of September 29, 1903, to Villy and with reference to Villy's British Patent No. 20,146 of 1902, Fig. 5, thereof.

By Mr. MILLER.—Same objection as before.

A. They are both bell-shaped horns.

Q. 117. And I ask you the same question with reference to Fig. 14, of French Patent to Turpin, No. 318,742 of February 17, 1902.

By Mr. MILLER.—Same objection.

A. This is also bell-shaped.

Q. 118. Please compare the shape of the horn shown in the drawing of the Nielsen Patent in suit, No. 771,441, with the shapes of the Kaiser horn, of the horn employed at the laboratory of the National Phonograph Company prior to March, 1904, and of the horns shown in [297] the figures referred to in the preceding questions of the Berliner, Villy and Turpin Patents.

A. The shapes of all these horns are very similar. The Nielsen, the Kaiser horn and the horn used at the laboratory prior to March, 1904, and the Berliner horn are identical. The horns of the two Villy Patents and the Turpin Patent have similar shaped bells but the body of the horn has a straight taper

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as compared to the Nielsen horn.

Q. 119. Please compare the shape of the Edison straight horn with the shape of the horn shown in Figures 5 of the two Villy Patents.

A. They are the same shape.

Q. 120. Have you considered the French Turpin Patent and Figs. 14, 15 and 16, thereof and do you understand the construction of the horn shown in those figures and described in the Turpin Patent?

A. I have and understand the construction described.

Q. 121. Please state what the construction of the horn shown in those figures of the French Turpin Patent is.

By Mr. MILLER.—Question objected to on the ground that the description of the patent is the best evidence unless the text of the patent be so ambiguous and *untelligible* as to require further explanation.

A. On figure 8 in this patent the body of the horn is composed of tapering strips of wood which are fastened at their edges by means of strips of wood on the inside or they can be fastened by wood or metal strips on the outside. Figure 14 states that the horn can be made bell-shaped by cutting the strips and bending them. These strips at their ends are inserted in an overlapped ring to hold their ends forming the large end of the horn, and the ends of the strips are fastened to a metal end piece, this end piece being inserted inside of the strips, an additional metal flange going around the outside

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of the strips and soldered to the end-piece. In order that it might better keep its shape he describes a ring which goes around the horn about one-third the distance from the [298] large end of the horn and held there with rods extending from this ring to the metal end-piece.

Q. 122. From your knowledge of this art and from a reading of the French Turpin Patent, can you say what material the skilled mechanic would have known might have been used in the construction of the horns such as those shown in Figs. 8 and 14 of the French Turpin Patent at the date of publication of that patent, October 25, 1902?

By Mr. MILLER.—Objected to as incompetent, irrelevant and immaterial and not calling for a statement of fact but for an opinion on a subject concerning which this witness is not qualified or competent to give an opinion.

By Mr. HICKS.—It appears from the testimony of the witness that on October 25, 1902, he was familiar with this art and then had the knowledge of the skilled mechanic in the art. It also appears that he is familiar with the French Turpin Patent and is at the present time an expert in the art.

By Mr. MILLER.—I do not agree to the correctness of the statement but challenge the same.

A. The material that could have been used would be preferably sheet-metal but the horn could also be constructed of wood, celluloid, paper.

Q. 123. Can you say whether at that date, October 25, 1902, the knowledge existing in this art with ref-

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ence to the construction of horns for phonographs and similar machines was sufficient or insufficient to enable a mechanic skilled in the art to substitute one material for another in the construction of a horn for phonographs according to the design desired?

By Mr. MILLER.—Same objection as to Q. 122.

A. I should say it was.

Q. 124. You would say it was sufficient or insufficient, which?

By Mr. MILLER.—Same objection as before also suggestive of the answer desired.

A. It was sufficient. [299]

Q. 125. Please refer to Fig. III of the U. S. Patent No. 453,798 of June 9, 1891, and to Fig. 2 of U. S. Patent No. 491,421 of Feb. 17, 1893, both to Gersdorff and state whether the instrument shown therein and described in the specification *x* could be used as a horn for phonographs and similar machines or whether any change would be necessary in such instrument in order to adapt it for such use.

By Mr. MILLER.—Same objection as to Q. 122.

A. This instrument will reproduce quite satisfactory provided the small end of same was large enough.

Q. 126. Have you here present any metal horn used to your knowledge for reproducing sound from a phonograph in the comparatively early days of the are? A. I have and here it is.

